90-1707

No. _____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

MARTIN COUNTY,
a political subdivision of the
State of Florida,

Petitioner,

vs.

EXECUTIVE 100, INC.
a Florida corporation,
KINGS RIDGE 239, INC.
a Florida corporation,

Respondents.

Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit erred when it held that the landowners' Due Process and Equal Protection claims were ripe, even though the landowners admittedly had not complied with the *MacDonald* reapplication requirement?

2. Whether the United States Court of Appeals for the Eleventh Circuit erred when it held that the Due Process and Equal Protection Counts of the landowners' Complaint adequately pled substantial federal questions, even though there was a complete absence of any allegation of the depriviation of a constitutionally protectable property interest or all of any factual allegation of differential treatment of similarily situated property owners?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Court of Appeals for the Eleventh Circuit were petitioner Martin County, a political subdivision of the State of Florida, and John W. Holt, Jr., Frank Wacha, Tom Kenney, Tom Higgins, and Margaret Hurchalla, individually and in their capacity as members of the Board of County Commissioners, as appellees, and respondents Executive 100, Inc., and Kings Ridge 239, Inc., as appellants.

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For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Martin County petitions that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this case on February 7, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Appendix, infra, A) is reported at 922 F.2d 1536.

The unreported order of the United States District Court for the Southern District of Florida, entered on May 23, 1989, is reprinted in the Appendix at 36.

JURISDICTION

On February 7, 1991, a panel of the Court of Appeals for the Eleventh Circuit decided Executive 100, Inc. v. Martin County, Case No. 89-5629 (Appendix A). This Court has jurisdiction to review the final decision of the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

The Constitutional provision involved is the Fourteenth Amendment to the United States Constitution, the relevant portions of which are reproduced in the Appendix at 41.

The statute principally involved in the decision of the Eleventh Circuit Court of Appeals is 42 U.S.C. § 1983, the relevant portions of which are reproduced in the Appendix at 42.

STATEMENT OF THE CASE

On April 1, 1982, petitioner Martin County enacted a Comprehensive Land Use Plan setting forth land use designations for all property within Martin County, Florida. The Comprehensive Plan contained an amendment procedure permitting property owners to apply for changes in the land use designation of their property. Property owners may also simultaneously apply for concurrent rezoning of their property to conform with any such changes in the land use designation.

On July 17, 1986, respondent Executive 100 purchased property in Martin County at the northwest corner of the intersection of Interstate 95 and County Road 714. At the time of purchase, the property was zoned rural ranchette, a residential zoning classification permitting one dwelling unit per five acres of property.

On January 23, 1985, respondent Kings Ridge 239, Inc. also purchased property in Martin County. Its property was located between the Florida Turnpike and Interstate 95 at the intersection of County Road 708. That property was zoned agricultural at the time of purchase.

Significantly, then, the respondent landowners' properties were zoned rural ranchette and agricultural when purchased in early 1985 and 1986, and so zoned today.

In September of 1987, the respondent landowners applied for amendments to the Comprehensive Plan, and for concurrent rezoning of their properties respectively from rural ranchette to light-industrial and from agricultural to industrial. The Martin County Planning and Zoning Board and subsequently the Martin County Commission denied the respondent landowners' application. The landowners do not allege that they ever reapplied for less ambitious rezoning or, as an alternate to rezoning, sought a greater density allowance or variances from the Comprehensive Plan. The landowners allege only that no other variance or exception procedure exists through which they can urge reconsideration.

In their ten-count Complaint, the landowners allege a violation of 42 U.S.C. § 1983 and the Fourteenth Amendment. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), 4. Generally, the landowners contend that the value of their properties has been significantly diminished and that petitioner's actions have intimidated potential purchasers from negotiating with respondents for the purchase of the property that is the subject of this action.

In their as-applied equal protection claims, Counts II and VII of the Complaint, the landowners allege that Martin County has "permitted the owners of other properties, similarly situated in all material respects to the subject property, to develop their properties for non-residential purposes." Complaint at Paragraph 42 [Appendix at 49].

In their as-applied substantive due process claims, Counts III and VIII of the Complaint, the landowners allege that:

> precluding industrial use of the subject property is arbitrary and unreasonable, has no reasonably debatable relationship to the public health, welfare, safety or morals, is inconsistent with surrounding areas and uses and is more strict or severe than necessary.

Complaint at Paragraph 46 [Appendix at 50.] The landowners contend, without any elaboration, that "because of its location, size and shape the subject property is unsuitable for use

for residential purposes." Complaint at Paragraph 47 [Appendix at 50.] These allegations are patently implausible, however, since the properties are currently zoned agricultural and rural ranchette, and were so zoned when purchased. The Complaint contains no allegation as to how the land became unsuitable or impossible to develop between the time it was purchased and the present time. Further, it contains no allegation that petitioner prevented the respondent landowners from developing their property consistent with the zoning existing at the time of purchase.

On the petitioner County's motion, the district court properly dismissed this action in its entirety. The district court concluded that all of the respondent landowners' claims, no matter what their underlying constitutional basis, were unripe under the finality prong of this Court's ripeness test for constitutional challenges to zoning decisions. The primary basis for that holding was that the landowners had each submitted only one application for an extremely intensive rezoning of the respective properties, but had not submitted any other applications for any less-intensive rezoning. Thus, the district court determined that there had been no final decision by the county as to the level of development that it would permit on the respondent landowners' properties and, therefore, there was as yet no final decision for the court to review for arbitrariness or excessiveness.

On appeal by the landowners, the Court of Appeals affirmed the district court's dismissal of the landowner's due process taking claims (counts one and six) and just compensation claims (counts four and nine), but reversed the dismissal of their as-applied equal protection claims (counts two and seven), as-applied arbitrarry and capricious due process claims (counts three and eight) and pendent tort claims (counts five and ten). The Court of Appeals determined that these equal protection claims, arbitrary capricious due process claims, and pendant state claims were ripe and "should continue." 922 F.2d at 1542.

One member of the panel disagreed with the Court of Appeals' ripeness holding and determination that the equal protection and due process claims should continue. Judge Clark observed that the panel decision would permit premature review by federal courts of local zoning decisions, and would require

federal courts to speculate about what rezoning applications the respondent landowners might file and how the County might have responded to these hypothetical applications.

He further observed, moreover, that the district court's decision should also have been affirmed because respondents' Complaint totally failed to allege any facts sufficient to state as-applied substantive due process and equal protection claims. With respect to the substantive due process claims, Judge Clark observed that the landowners' Complaint had not alleged, and indeed could not allege, that respondents had been deprived of any constitutionally protected property interest. With respect to the equal protection claims, Judge Clark observed that the landowners had failed to allege any factual basis to support their conclusory allegations that the County had treated their property differently than similarly situated property of others.

REASONS FOR GRANTING THE WRIT

1. **The Writ Should Be Granted Because The Court Of Appeals' Decision, Holding The Landowners' Equal Protection And Due Process Claims To Be Ripe, Conflicts With The Prior Decisions Of This Court, And Those Of Several Courts Of Appeals, And Would Open The Flood-Gates For Premature Review By Federal Courts Of Virtually Every Garden-Variety Rezoning Denial By Local Zoning Authorities.**

In determining that the landowners' as-applied equal protection and substantive due process claims were ripe for judicial review, the Court of Appeals ignored the prior decisions of this Court and the prior decisions of the Seventh, Ninth, and Tenth Circuits. The core of this Court's ripeness jurisprudence is "an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulation that purports to limit it." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986). This Court has held that constitutional challenges to zoning decisions are "ripe for review" when the landowner has received the local zoning authority's " 'final, definitive position regarding how it will apply the regulation at issue to the particular land in question.' " *Id.* (quoting *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S.

172, 191 (1985)). Such final and definitive position by the local zoning authority must expose the "nature and extent of permitted development" *MacDonald*, 106 S.Ct. at 2567. In the present case, though the landowner has not yet sought from the local zoning authority a final determination of how their land may be used, the Court of Appeals nevertheless held the landowners' above-described constitutional challenges to be ripe for judicial review. That holding is clearly erroneous.

In *Williamson County*, this Court held that a § 1983 claim for monetary damages allegedly caused by a regulatory taking of property is not ripe for review on the merits, whether such claim is denominated as a just compensation claim or substantive due process claim, unless the property owner demonstrates that the local zoning authority has reached a final decision regarding the application of such regulations to the property at issue. *Williamson County*, 473 U.S. at 186-94, 197-200. Such finality has been found wanting where the landowner submitted and the zoning authority has rejected one comprehensive development plan for the property, but the landowner had not sought approval for any less ambitious schemes of development, and thus it was not yet clear precisely what development would be permitted on the subject property. *MacDonald*, 477 U.S. at 348-53 & n.9 ("Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *Id.* at 353 n.9). Thus, a landowner asserting a substantive due process challenge to a zoning decision must, in order to have a ripe claim, satisfy the finality prong of the ripeness test established by this Court in *Williamson County* and *MacDonald*.

While this Court's prior decisions involve only just compensation and substantive due process challenges to zoning decisions, numerous Courts of Appeals have held the finality prong of this Court's ripeness test applicable as well to equal protection challenges. *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990) ("All as-applied challenges to regulatory takings, whether based on the just compensation clause, the due process clause or the equal protection clause, possess the same ripeness requirement: a final determination by the relevant governmental body." *Id.* (citing *Pennell v. City of San*

Jose, 485 U.S. 1, 11 n.5 (1987))); *Landmark Land Company of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989); *Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988), *modifying* 834 F.2d 1488 (9th Cir. 1987), *cert. denied*, 109 S.Ct. 1557 (1989); *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir. 1988). All of these decisions are contrary to the Court of Appeals' decision below.

In the Tenth Circuit's decision in *Landmark*, the case probably most similar to the present case, the landowner, seeking both monetary damages and injunctive relief, challenged the subject zoning decision as a violation of its rights to procedural and substantive due process, a denial of equal protection, a taking without just compensation, an illegal conspiracy, and tortious interference with contractual relations. The *Landmark* Court affirmed the District Court's granting of the zoning authority's motion to dismiss all of the landowner's claims, including its equal protection claim, on ripeness grounds. *Landmark*, 874 F.2d at 722. In holding the landowner's equal protection claim unripe under the finality prong of this Court's ripeness test established in *Williamson County* and *MacDonald*, due to the landowner's failure to pursue alternate development plans, the *Landmark* Court noted as follows:

> This case presents us with an equal protection challenge to a facially neutral set of policies and procedures applied in an allegedly arbitrary and discriminatory fashion to a specific individual. Since [the local zoning authority's] actions do not affect a suspect class or a fundamental right, they must be reviewed under an arbitrariness standard. The final local decision which must be reviewed for arbitrariness is the decision to allow a particular level of development. That level must also be compared to that permitted other landowners, to determine if Plaintiff has been treated differently.
>
> An equal protection challenge to a policy or regulation that facially dictates different treatment for specific classes, such as blacks or other minorities, would not present us with the same ripeness problems as [the

> subject landowner's] claim. Such an explicit decision, for equal protection purposes, would be final and reviewable when made. Cases involving such claims may, of course, involve standing issues regarding whether the Plaintiff has been adversely affected by the policy. However, the difficulty here, namely evaluating what decision has actually been made, is absent in those cases.

Id. at 722 n.3 (emphasis added). Thus, under *Landmark*, as well as the other cited decisions of the Seventh and Ninth Circuits, to have a ripe claim a landowner asserting an ordinary equal protection challenge to a zoning decision must also satisfy the finality prong of the ripeness test established by this Court in *Williamson County* and *MacDonald*. The standard is the same as for a landowner asserting a substantive due process or just compensation challenge to such zoning decision.

Stated succinctly, the above-discussed cases stand for the following pertinent proposition concerning the ripeness issue: *all* constitutional challenges to zoning decisions, except those entitled to strict scrutiny, are subject to the finality prong of this Court's ripeness test, irrespective of their precise constitutional underpinnings. The reason why this proposition holds true is clear. The Fourteenth Amendment requires that "[n]o State shall . . . deprive any person of . . . property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." United States Consititution, Amendment XIV, §1. Thus, all constitutional challenges to zoning decisions, whether denominated as takings claims, denials of equal protection, or denials of due process, have as their gravamen the deprivation of a property interest. Therefore, "regardless of the type of claim, it is generally impossible to determine the extent of the infringement until a final determination by the relevant governmental body." *Sinaloa Lake Owners Association v. Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989). Clearly then, the finality prong of this Court's ripeness test, including the *MacDonald* reapplication requirement, must apply to all such ordinary constitutional challenges to zoning decisions.

Petitioner submits that there are three compelling reasons why

this Court should grant the writ and determine, contrary to the Court of Appeals' decision, that the *MacDonald* reapplication requirement is indeed applicable to as-applied substantive due process and equal protection challenges to rezoning denials. First, in many cases, such as the present one, where the subject rezoning application essentially spanned the entire intensity spectrum of the zoning scale, from one of the least intensive to one of the most intensive zoning categories, determining the level of permissible development is extremely significant in assessing the arbitrariness of the denial of the subject rezoning decision. This is so because the degree of arbitrariness of such rezoning denial is dependant just as much upon the level of development that will be permitted as it is upon the level of development that will not be permitted. After all, as previously mentioned, "[t]he final local [zoning] decision which must be reviewed for arbitrariness is the decision to allow a particular level of development." *Landmark*, 874 F.2d at 722 n.3. Thus in the present case, the degree of arbitrariness of the alleged deprivation of property or of the alleged unequal treatment of landowners is simply impossible to reasonably determine until the level of permissible development is known.

Second, even if the degree of arbitrariness could be assessed, until the landowner has complied with the reapplication requirement, the reviewing Court could only speculate as to the harm done and the appropriate compensatory damages to be awarded. Thus, in the present case, any award of damages would be purely speculative until the final decision has been made as to what, if any, intermediate level of development would be permitted on the subject land.

Third, and finally, it is only the *MacDonald* reapplication requirement that effectively guards against premature judicial review of local legislative decisions, which premature review would result in both a complete reversal of traditional rezoning procedures and a wholly unwarranted usurpation of local legislative authority. Traditional rezoning procedures would be completely reversed, because without the reapplication requirement the defending local government will be compelled to present evidence as to what, if any, intermediate levels of zoning intensity it might hypothetically permit on the subject property. *See Greenbriar, Ltd. v. City of*

Alabaster, 881 F.2d 1570, 1576 (11th Cir. 1989) (failure of local government to present evidence of hypothetically permissible intermediate zoning intensities constitutes a concession that the only permitted alternative development would be under the existing zoning classification). Thus, absent applicability of the *MacDonald* reapplication requirement to as-applied substantive due process and equal protection claims, landowners could effectively use the Courts to circumvent and reverse traditional rezoning procedures. Landowners could make a single application for the most intensive possible rezoning of their property and, upon denial thereof, rather than reapply for an intermediate intensity of rezoning, simply challenge such denial in the courts. This procedure would effectively compel the defending local government to establish what intermediate levels of zoning it will permit in a judicial rather than a legislative forum.

Local legislative authority would be judicially usurped. In virtually every rezoning dispute landowners would be free to ask the courts to use their injunctive powers to effectively legislate as to the appropriate level of development that would be permitted on the property.

Thus, absent a reapplication requirement for ripeness of any ordinary constitutional challenge, the courts, not the local legislatures, would become the forum for determining local zoning decisions. This would not only be an unprecedented and unwarranted judicial usurpation of local legislative authority in this delicate area of overriding local concern, but would also greatly overburden the federal courts. The flood-gates would be opened for federal judicial resolution of virtually every garden-variety rezoning dispute. Therefore, the result of eliminating the reapplication requirement from the ripeness test for ordinary as-applied substantive due process and equal protection claims would be both a complete reversal of traditional rezoning procedures and an extremely unwarranted judicial usurpation of local legislative authority.

Accordingly, for all the foregoing reasons, this Court should determine, that the *MacDonald* reapplication requirement is indeed a part of the ripeness test for *all* constitutional challenges to local rezoning decisions, including as-applied substantive due

process and equal protection challenges.

II. The Writ Should Be Granted Because The Court Of Appeals Erroneously Determined That The Due Process And Equal Protection Counts Of The Landowners' Complaint Adequately Pled Substantial Federal Questions.

In its decision below, the Court of Appeals determined that the landowners' as-applied substantive due process and equal protection counts each pled a substantial federal question. That determination was clearly erroneous in both respects.

A. Substantive Due Process Claims.

The Court of Appeals' determination that the landowner's Complaint set forth substantive due process claims was erroneous, because the landowners' Complaint wholly failed to allege any constitutionally protectable property interest. Indeed, from the facts alleged in the landowners' Complaint, it is clear that they *cannot* properly assert such allegations.

As this Court has previously held, "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person *has already aquired* in specific benefits." *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972) (emphasis added). To have a property interest, a person "clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. Furthermore, this court has recognized that while zoning by its nature "interfers" significantly with landowners' uses of property, "[i]t is hornbook law that '[m]ere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or to entitle him to a variance or rezoning.' " *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 674 n.8 (1976) (quoting 8 E. McQuillan, Municipal Corporations §25.44, at 111 (3d ed. 1985)); *see also Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962) (ordinance may lawfully prohibit best and most beneficial use.)

When landowners challenge governmental action as a deprivation of property without substantive due process of law, "[t]he threshold determination . . . is whether [such landowners]

owners] have a property interest protected by the Constitution." *Marine One, Inc. v. Manatee County*, 877 F.2d 892, 894 (11th Circuit 1989). In making that threshold determination, the federal courts must look to state law. *Board of Regents v. Roth*, 408 U.S. at 577 (property interests are created, not by the Constitution, but by "an independent source such as state law"); *Marine One*, 877 F.2d at 894.

In the present case, it is clear from the facts alleged in the landowners' Complaint that the only possible property interest at issue is that of a claim of entitlement to the industrial rezoning they requested but were denied. Florida law could not be clearer that there is simply no property right to a particular rezoning of one's property. *See Gainesville v. Cone*, 365 So.2d 737, 739 (Fla. 1st DCA 1978) (no property interest existed in continuation of existing zoning or new zoning classification applied for); *Epifano v. Town of Indian River Shores*, 379 So.2d 966 (Fla. 4th DCA 1979) (no vested right to certain zoning). Similarly, under Florida law, one who has acquired property for a purpose known to be prohibited by the current zoning ordinances cannot contend that a zoning change is needed to prevent confiscation of his property, absent a showing that the property as zoned at the time of purchase was not suitable for the purpose for which it was zoned. *Broward County v. Capeletti Brothers, Inc.* 375 So.2d 313 (Fla. 2d DCA 1979). Moreover, a zoning ordinance is not confiscatory because a single reasonable use is denied. *Id.* at 315.

Thus, it is plain that the landowners in this case did not and indeed could not allege that they have a constitutionally protectable property interest in having their rezoning application approved. Their property was zoned rural ranchette and agricultural *when they purchased it*, and that remains the applicable zoning today. Clearly then, the landowners' allegation that the value of their property has been diminished significantly by the County's denial of the rezoning request is *patently* implausible, and any hardship resulting from the present zoning designation is self-imposed. Therefore, it is plain that there is simply no basis in law for the Court of Appeals' determination that the landowners have properly alleged that they have been deprived of constitutionally protected property interests. Accordingly, the Counts in the landowners' complain that purport to set forth substantive

due process claims fail to state any claim upon which relief can be granted, because they fail to allege that the landowners have been deprived of any constitutionally protectable property interest.

B. Equal Protection Counts

The Court of Appeals' determination that the landowners' Complaint sufficiently plead equal protection claims is clearly erroneous. The landowners here have wholly failed to sufficiently allege a differential classification of similarly situated persons caused by intentional or purposeful discrimination. The landowners here do allege that the County petitioner intentionally discriminated against them and in favor or other similarly situated property owners, by redesignating those similarly situated properties for non-residential use while denying the landowners applications for similar changes in zoning. A perusal of the landowners' Complaint plainly reveals a complete absence of any allegation of facts even remotely suggesting how these landowners and other property owners were, in fact, similarly situated prior to rezoning by the rezoning authority of property other than that owned by the respondent landowners.

Indeed, nowhere does the Complaint allege that the County granted a rezoning application as drastic as that sought by the respondent landowners here (*i.e.*, that property zoned rural ranchette or agricultural under the County's Comprehensive Plan was subsequently rezoned industrial or light industrial). Furthermore, nowhere do the respondent landowners allege in their Complaint that the "permitted" non-residential rezoning of other properties occurred before or after the adoption of the County's Comprehensive Plan. Finally, nowhere does the subject Complaint allege how other properties are similar in all material respects to the property that is the subject of this action. Indeed, the only description of the similarity of the parcels in question in relation to other properties is that they are all adjacent to Interstate 95. Thus, from the sketchy allegations contained in the Complaint, it is simply impossible to determine whether or not the County has accorded different treatment of similarly situated properties for purposes of establishing a denial of equal protection.

The decisions of this Court have established beyond all ques-

tion that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 131, 147 (1940). With regard to differential treatment of landowners by zoning boards, "[d]ifferent treatment of dissimilarly situated persons does not violate the equal protection clause." *E & T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987). Since the landowners here have wholly failed to sufficiently allege a differential classification of similarly situated persons caused by intentional or purposeful discrimination, they simply have not and cannot claim a denial of equal protection.

It is important to observe that the landowners here do not claim that they have been denied a change in zoning because they are members of a suspect or even quasi-suspect class, nor that the change in zoning was a fundamental right. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216-18 (1982). Instead, the landowners here merely allege that in denying their application for rezoning or redesignating the property of others on its own initiative, the County denied the respondent landowners equal protection by acting arbitrarily and intentionally. *See, e.g., Reed v. Reed*, 404 U.S. 71, 76 (1971).

To successfully state a claim of unconstitutional denial of equal protection, the landowners here must allege that they were treated differently as the result of actions that did not "rationally advanc[e] a reasonable and identifiable government objective." *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981). The landowners in this case, however, have wholly failed to allege any facts sufficient to withstand the County's motion to dismiss their claim of denial of equal protection.

The Court of Appeals' determination that the landowners' Complaint alleges sufficient facts to set forth a claim of denial of equal protection, if allowed to stand, would permit any landowner to successfully plead a denial of equal protection any time a zoning authority draws a zoning boundary line at any particular location, thereby requiring more restrictive use of the property on one side of the boundary line than on the other side. This is clearly contrary to established precedent, because "[t]he law is well settled that legislative zoning ordinances are permissible, constitutional uses of police power and are not reviewable by district courts

unless they are *'clearly arbitrary and unreasonable,* having no substantial relation to the public health, safety, morals, or general welfare.' " *Grant v. County of Seminole,* 817 F.2d 731, 736 (11th Cir. 1987) (emphasis added) (quoting *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395 (1926)). It is only upon a *"factual showing* of arbitrariness" that federal courts will inquire whether there is "some basis in fact and law to justify the zoning action as consistent with reasonableness." *South Gwinnett Venture v. Pruitt,* 491 F.2d 5, 7 (5th Cir.) (en banc), *cert. denied* 419 U.S. 837 (1974). Allegations that the local government's decisions "in reviewing and denying [the landowners' rezoning] requests have been made with malice toward the [landowners], have been made with reckless disregard for the rights of the [landowners], have been arbitrary, have been capricious, willful and wanton," are not factual allegations. *See, e.g., Estate of Himelstein v. Ft. Wayne,* 898 F.2d 573, 578 (7th Cir. 1990). Absent some factual allegations of arbitrariness, federal courts should simply not reach the question whether the actions of the zoning authority were unreasonable.

A careful review of the allegations contained in the respondent landowners' Complaint reveals that there is a complete absence of any factual allegations sufficient to set forth a claim of denial of equal protection. The respondent landowners' conclusionary allegations are insufficient as a matter of law. Accordingly, the Court of Appeals erred in determining that the landowners' Complaint sufficiently alleged equal protection claims.

CONCLUSION

For the reasons discussed above, a writ of *certiorari* should issue to review the judgment and opinions of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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EXECUTIVE 100 INC., a Florida Corporation, Kings Ridge 239, Inc., a Florida Corporation, Plaintiffs-Appellants,

v.

MARTIN COUNTY, a Political Subdivision of the State of Florida, et al., Defendants-Appellees.

No. 89-5629

United States Court of Appeals,
Eleventh Circuit.

Feb. 7, 1991.

Landowners brought action alleging violation of constitutional rights and tortious interference with prospective advantage as the result of county's denial of request for zoning change. The United States District Court for the Southern District of Florida, No. 88-14188-CIV-JAG, Jose A. Gonzalez, Jr., J., dismissed the complaint as premature, and landowners appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) claims of denial of property without due process were not ripe for adjudication where landowners had not sought variances or pursued alternative, less ambitious development plan; (2) claims of denial of equal protection and arbitrary and capricious conduct in violation of due process rights were ripe; (3) claim of taking without just compensation was not ripe where landowners had not pursued state court reverse condemnation proceedings; and (4) complaint stated cause of action for tortious interference with advantageous relationship.

Affirmed in part and reversed in part.

Clark, Circuit Judge, filed an opinion concurring in part and dissenting in part.

See also 739 F. Supp. 1521.

1. **Municipal Corporations → 170**
Local legislators are entitled to legislative immunity, but

defendant who enjoys official immunity from suits for damages may be subject to suits for prospective injunctive relief.

2. Zoning and Planning → 92

Complaint which asked for order declaring that there was a violation of landowners' rights, for injunction preventing the "county" from enforcing comprehensive land use plan, and for compensatory and punitive damages from the individual county board members did not seek injunctive relief against individual board members.

3. Constitutional Law → 278.2(1)
Eminent Domain → 2(1.2)
Zoning and Planning → 27

Landowner seeking to challenge local government's refusal to rezone his property may bring four causes of action; he may claim that the zoning applied to his land constitutes a taking of his property without just compensation, he may claim that the zoning applied to his property goes too far and destroys the value of his property to such an extent that it amounts to a taking by eminent domain without due process of law, he may argue that the regulation is arbitrary and capricious, does not bear substantial relationship to public health, safety, morals, or general welfare, and he may claim that zoning denies him equal protection of the law because it treats the suspect class differently from others, affects a fundamental right, or treats a nonsuspect class differently and is not rationally related to a legitimate government purpose. U.S.C.A. Const.Amends. 5, 14.

4. Civil Rights → 235(4)
Constitutional Law → 46(1)

Complaint which alleged that county board deprived landowners of property without due process of law by denying rezoning alleged due process claims and, in order to be ripe for adjudication, there had to be a final decision regarding the application of the zoning ordinances to their property, including the denial of variance applications. U.S.C.A. Const.Amend. 14.

5. Constitutional Law → 46(1)

Due process taking claims of landowners who did not allege

that they had sought variances or pursued alternative, less ambitious development plans than those which were rejected by county were not ripe. U.S.C.A. Const.Amend. 14.

6. Constitutional Law → 46(1)

Claims that denial of requests for rezoning violated landowners' equal protection rights because county board's action had no rational basis were not subject to requirement that landowners have sought variance; in order to establish ripeness of their equal protection claims, landowners only had to show that the county board had made a final decision denying commercial zoning. U.S.C.A. Const.Amend. 14.

7. Constitutional Law → 228.2

Landowners who alleged that county board treated them differently than other similarly situated landowners without any reasonable basis when denying their request for rezoning stated an equal protection claim. U.S.C.A. Const.Amend. 14.

8. Constitutional Law → 46(1)

Landowners' claims that county board's actions in denying rezoning were arbitrary and capricious were due process claims and were ripe even though landowners had not pursued possible variances or less ambitious development plans than those rejected by the county. U.S.C.A. Const.Amend. 14.

9. Constitutional Law → 278.2(1)

Test for determining whether there has been a violation of due process as a result of denial of rezoning has two prongs: court must first determine whether there has been a deprivation of a constitutionally protected interest, and then must determine whether the deprivation was the result of an abuse of government power sufficient to raise an ordinary tort to the stature of a constitutional violation. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

10. Constitutional Law → 278(1)

Deprivation of property interest is of constitutional stature if it is undertaken for improper motive and by means that were

pretextual, arbitrary, and capricious, and without rational basis; in zoning context, issue is whether government action bore any substantial relation to the public welfare. U.S.C.A. Const.Amend. 14.

11. Constitutional Law → 278.2(1)

If landowners proved that diminution in property was more than a simple fluctuation in value incident to governmental decision making, they could show deprivation of property right as a result of denial of rezoning. U.S.C.A. Const.Amend. 14.

12. Civil Rights → 235(4)

Landowners who alleged that county board's actions in denying rezoning were unrelated to public welfare because the land was not suitable for its present zoning status adequately alleged arbitrary and capricious action in violation of landowners' due process rights.

13. Federal Courts → 13.25

Claim that government regulation effects a taking of property without just compensation is not ripe until the government entity charged with implementing the regulation has made a final decision regarding the application of the regulation to the property at issue. U.S.C.A. Const.Amend. 5.

14. Eminent Domain → 266

If government has provided adequate process for property owner to obtain compensation and if resort to that process yields just compensation, owner has no just compensation claim. U.S.C.A. Const.Amend. 5.

15. Federal Courts → 13.25

Claims that government had confiscated property without just compensation by denying rezoning were not ripe for adjudication where landowners had not pursued compensation through state court reverse condemnation proceedings. U.S.C.A. Const.Amend. 5.

16. Torts → 10(1)

Under Florida law, tortious interference with advantageous

relationship consists of the existence of an advantageous business relationship under which the plaintiff has legal rights, intentional and unjustified interference with that relationship by the defendant, and damage to the plaintiff.

17. Torts → 26(1)

Landowners stated claim, under Florida law, for tortious interference with advantageous relationship against county board which denied request for rezoning by alleging that they had prospective advantageous relationships with certain potential purchasers, that county board told potential purchasers that the property could only be used for residential or agricultural purposes, and that they suffered damage.

Appeal from the United States District Court for the Southern District of Florida.

Before JOHNSON and CLARK, Circuit Judges, and BROWN*, Senior District Judge.

JOHNSON, Circuit Judge:

This case arises on appeal from the district court's order of May 23, 1988 dismissing the plaintiffs' complaint as premature.

I. FACTS

A. *Background*

The plaintiffs, Executive 100, Inc. ("Executive") and Kings Ridge 239, Inc. ("Kings Ridge") (referred to together as the "plaintiffs"), purchased parcels of land in Martin County Florida. Executive's parcel is bordered on the south by County Road 714, and on the east by a new segment of Interstate 95 completed in 1987. Kings Ridge's parcel is between the Florida Turnpike and the new segment of Interstate 95.

The completion of Interstate 95 has added significantly to the development value of both parcels. In order to capitalize on this new value, both plaintiffs filed applications for amendments to the Martin County Comprehensive Land Use Plan to change the zoning of their parcels from agricultural/rural ranchette[1] to

industrial. The County Local Planning Agency reviewed the applications and passed them on to the Board of County Commissioners of Martin County (the "Board"), which denied the zoning changes.

The Board, however, did grant an amendment to the Martin County Comprehensive Land Use Plan to change the zoning of two parcels along Interstate 95, owned by interests other than the plaintiffs, to industrial. One parcel was located at the interchange of Interstate 95 and County Road 76, and the other parcel was located at Interstate 95 and County Road 708.

B. *Proceedings in the District Court*

The plaintiffs filed this suit under 42 U.S.C.A. § 1983, alleging ten counts: five on behalf of Executive, and an identical five on behalf of Kings Ridge.[2] Counts one and six alleged that the Board, by denying the rezoning requests, deprived the plaintiffs of property without due process of law. Counts two and seven alleged that the Board's actions violated plaintiffs' equal protection rights. Counts three and eight alleged that the agricultural/rural ranchette zoning regulation is unreasonable, arbitrary and capricious. Counts four and nine alleged that the prohibition of industrial use was so unrelated to the public welfare that it was a confiscation of property. Counts five and ten alleged that the Board wrongfully interfered with plaintiffs' prospective economic advantage.

The Board moved to dismiss the complaint on the grounds of legislative immunity and on the grounds that the plaintiffs' complaint was unripe. The district court found that the complaint failed to allege specific facts sufficient to preclude the application of legislative immunity and dismissed all of the claims against the defendants in their individual capacities. The court also found that the plaintiffs had failed to exhaust state inverse condemnation proceedings that were available under *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), and *Joint Ventures, Inc. v. Dept. of Transp.*, 563 So.2d 622, 628 (Fla.1990).[3] The court, therefore, dismissed all of the counts as unripe.[4] In this appeal, we first consider whether the district court erred in holding that the

individual defendants were entitled to legislative immunity with respect to all claims in the complaint. We then consider whether the district court erred in finding that the plaintiffs' complaint was premature.

II. STANDARD OF REVIEW

This Court must review *de novo* the district court's order dismissing the complaint. *See Luckey v. Harris*, 860 F.2d 1012, 1016-17 (11th Cir.1988); *Jackam v. Hospital Corp. of Am. Mideast, Ltd.*, 800 F.2d 1577, 1579 (11th Cir.1986). Federal Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a complaint on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 109 S.Ct. 1827, 1832, 104 L.Ed.2d 338 (1989). The motion to dismiss should be denied, however, unless it appears beyond all doubt that the plaintiffs can prove no set of facts that would entitle them to relief. *Luckey*, 860 F.2d at 1016. The allegations in the plaintiffs' complaint must be taken as true for purposes of the motion to dismiss. *See id.*

III. ANALYSIS

A. *Legislative Immunity*

The plaintiffs argue that the district court erred in dismissing their claims against the Board members in their individual capacities because the plaintiffs claimed prospective injunctive relief as well as monetary damages.[5] The Board argues that the complaint did not seek injunctive relief against the Board members in their individual capacities. The Board also argues that claims for injunctive relief may be brought against government officials only in their official capacities, and not in their individual capacities, where the relief sought is an order concerning the defendants' official duties.

[1,2] Local legislators are entitled to legislative immunity in this Circuit. *DeSisto College v. Line*, 888 F.2d 755, 764-65 (11th Cir.1989). A defendant who enjoys official immunity from suits for damages may, however, be subject to suits for prospective injunctive relief. *Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S.Ct. 1970, 1980-81, 80 L.Ed.2d 565 (1984). Nevertheless, in the present case, none of the plaintiffs' counts ask for an injunction against an individual Board member.[6] Accordingly, the plaintiffs

do not ask for injunctive relief against the Board members in their individual capacities. The plaintiffs' argument, therefore, is baseless.[7]

B. *Ripeness of Complaint*

[3] A plaintiff seeking to challenge a local government's refusal to rezone his property may bring four different causes of action. *Eide v. Sarasota County,* 908 F.2d 716, at 719-23 (11th Cir.1990). First, a plaintiff may claim that the zoning applied to his land constitutes a taking of his property without just compensation in contravention of the Fifth Amendment. (labeling this claim a "just compensation claim"): Second, a plaintiff may claim that the zoning applied to his property goes too far and destroys the value of his property to such an extent that it amounts to a taking by eminent domain without due process of law. *Id.* at 721 (labeling this claim a "due process takings claim"). Third, a plaintiff may argue that the regulation, either on its face or as applied, is arbitrary and capricious, does not bear a substantial relation to the public health, safety, morals, or general welfare, and therefore is an invalid exercise of the police power. *Id.* at 721-22 (labeling this claim as an "arbitrary and capricious due process claim").[9] Finally, a plaintiff may claim that the zoning denies him equal protection of the laws, either because it treats a suspect class differently from others, because it affects a fundamental right, or because it treats a non-suspect class differently and is not rationally related to a legitimate government purpose. *Id.* at 722 (labeling this an "equal protection" claim).[10]

1. Counts One and Six of Complaint

The Board asserts that the plaintiffs' claims are not ripe because the plaintiffs have not proposed alternative zoning so as to reach a final determination of the nature and extent of development that the Board will permit on the plaintiffs' land. In *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986), the Supreme Court stated that "[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *Id.* at 349, 106 S.Ct. at 2567. In *MacDonald,* the Court refused to hear the

plaintiff's just compensation claim after its first development plan was rebuffed because the state courts had "le[ft] open the possibility that some development [would] be permitted, and . . . le[ft] [the Court] in doubt regarding the antecedent question whether appellant's property ha[d] been taken." *Id.* at 352-53, 106 S.Ct. at 2567-68. Accordingly, the Court held that the plaintiff's just compensation claim would not be ripe until the plaintiff reapplied for a permit to pursue a less ambitious development plan. *Id.* at 352-53 n. 9, 106 S.Ct. at 2568 n. 9.

[4, 5] Counts one and six of the plaintiffs' complaint alleged that the Board deprived the plaintiffs of property without due process of law. These claims are due process takings claims.[11] In order for these claims to be ripe for adjudication, the plaintiffs must obtain a final decision regarding the application of the zoning ordinances to their property, including denial of variance applications.[12] *Eide,* at 721, 720; *MacDonald,* 477 U.S. at 352-53, 106 S.Ct. at 2567-68. In the present case, the plaintiffs do not allege that they have sought variances or pursued alternative, less ambitious development plans. Accordingly, the plaintiffs' due process takings claims (counts one and six) are not ripe and should be dismissed.

2. Counts Two and Seven of Complaint

[6] Counts two and seven of plaintiffs' complaint allege that the Board's actions violated plaintiffs' equal protection rights. These claims, which are based on allegations that the Board's action had no rational basis, are not barred by *MacDonald's* reapplication requirement. *See Eide,* at 724 n. 12. In order to establish the ripeness of their equal protection claims, the plaintiffs must show only that the Board has made a final decision denying commercial zoning. *Eide,* at 724 n. 12, 725 n. 16.

[7] In cases involving economic regulation, the courts apply the rational basis test to regulations challenged under the Equal Protection Clause. *Williamson v. Lee Optical,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); *Eide,* at 722. Legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 440, 105 S.Ct. 3249, 3254,

87 L.Ed.2d 313 (1985). The plaintiffs allege that the defendants treated them differently from other similarly situated landowners along Interstate 95 without any reasonable basis. Accordingly, the plaintiffs state an as applied equal protection claim. These claims (counts two and seven) should continue.

3. Counts Three and Eight of Complaint

[8] Counts three and eight of the plaintiffs' complaint allege that the Board's actions were arbitrary and capricious. This Court has stated that the reapplication requirement of *MacDonald* has no bearing on as applied arbitrary and capricious due process claims. *Eide,* at 725 n. 16. Accordingly, the plaintiffs' as applied arbitrary and capricious due process claims (counts three and eight) are not barred by *MacDonald.*

[9, 10] The test in this Circuit as to whether there has been a violation of due process in the context of section 1983 has two prongs. First, the court must determine whether there has been a deprivation of a constitutionally protected interest. Second, the court must determine whether the deprivation was the result of an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation. *Greenbriar Ltd. v. City of Alabaster,* 881 F.2d 1570, 1577 (11th Cir.1989). A deprivation is of constitutional stature if it is undertaken for improper motive and by means that were pretextual, arbitrary and capricious, and without rational basis. *Id.* In the zoning context, the issue is whether the Board's action bore any substantial relation to the public welfare. *Id.*

[11, 12] On the first prong, the plaintiffs allege that the value of their property has been diminished significantly by the Board's actions in denying their requests for rezoning. They also allege harm "including the denial to the Plaintiff[s] of the opportunity otherwise available to [them] to sell [their] property for industrial use." If the plaintiffs prove that this diminution was more than a simple fluctuation in value incident to governmental decision-making, which is a noncompensable hazard of ownership, *see First Lutheran Church,* 482 U.S. at 320, 107 S.Ct. at 2388; *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 198-99, 105 S.Ct. 3108, 3122-23, 87 L.Ed.2d 126 (1985) (citing *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 414, 43 S.Ct. 158,

67 L.Ed. 322 (1922)), then they will have shown a deprivation of a property right. On the second prong, the plaintiffs allege that the Board's actions were unrelated to the public welfare because their land is not suitable for its present zoning status. Accordingly, the plaintiffs' complaint states as applied arbitrary and capricious due process claims. These counts (three and eight) should proceed.

4. Counts Four and Nine of Complaint

[13, 14] Counts four and nine of the plaintiffs' complaint allege that the Board's actions amounted to a confiscation of property. A claim that a government regulation effects a taking of property without just compensation is not ripe until the government entity charged with implementing the regulation has made a final decision regarding the application of the regulation to the property at issue. *Williamson County,* 473 U.S. at 186, 105 S.Ct. at 3116; *Eide,* at 720. Moreover, if the government has provided an adequate process for the property owner to obtain compensation, and if resort to that process yields just compensation, then the owner has no just compensation claim. *Williamson County,* 473 U.S. at 194-95, 105 S.Ct. at 3120-21. Reverse condemnation proceedings are one procedure for pursuing just compensation. *Id.* at 196-97, 105 S.Ct. at 3121-22.

[15] In *First Lutheran Church,* the Supreme Court held that when a state regulation temporarily deprives a property owner of all use of his property, the state must provide compensation under the just compensation clause. *First Lutheran Church,* 482 U.S. at 315, 107 S.Ct. at 2386. The Florida courts have recognized that under *First Lutheran Church* property owners have the right to bring reverse condemnation proceedings seeking compensation for regulatory takings. *Joint Ventures,* at 622. Accordingly, under *Williamson County* the plaintiffs' claims that the government has confiscated property without just compensation (counts four and nine) are not ripe for adjudication because the plaintiffs have not pursued compensation through a reverse condemnation proceeding. *Williamson County,* 473 U.S. at 195, 105 S.Ct. at 3121 ("a property owner has not suffered a violation of the just compensation clause until the owner has unsuccessfully attempted to obtain just compensation. . ."); *see also Anthony v.*

Franklin County, 799 F.2d 681, 684 (11th Cir.1986).[13]

5. Counts Five and ATen of Complaint

[16, 17] Finally, counts five and ten of the plaintiffs' complaint allege that the Board wrongfully interfered with their prospective economic advantage. Under Florida law, tortious interference with an advantageous relationship consists of the following elements: (1) the existence of an advantageous business relationship under which the plaintiff has legal rights, (2) an intentional and unjustified interference with that relationship by the defendant, and (3) damage to the plaintiff. *Lake Gateway Motor Inns v. Matt's Sunshine Gift Shops, Inc.*, 361 So.2d 769, 771 (Fla. Dist.Ct.App.1978). Plaintiffs allege that they had "prospective advantageous business relationships with certain potential purchasers. . ." They also allege that the Board "told potential purchasers of the subject property that the subject property could be used, now and in the future only for [residential (Executive) or] agricultural [(Kings Ridge)] purposes." Plaintiffs also allege damage. If the plaintiffs should prove that the Board intentionally and unjustifiably interfered with the plaintiffs' prospective business relationship, causing the plaintiffs damage, they will prevail on these claims. Accordingly, these claims (counts five and ten) should continue.

IV. CONCLUSION

We AFFIRM the district court's dismissal of the claims against the Board members in their individual capacities. We also AFFIRM the district court's dismissal of the plaintiffs' due process takings claims (counts one and six) and just compensation claims (counts four and nine). We REVERSE the district court's dismissal of the plaintiffs' as applied equal protection claims (counts two and seven), as applied arbitrary and capricious due process claims (counts three and eight), and tort claims (counts five and ten).

CLARK, Circuit Judge, concurring in part, and dissenting in part:

I. INTRODUCTION

"Zoning provides one of the firmest and most basic of the

rights of local control."[1] And, as this court has recognized, it is "not the function of federal district courts to serve as zoning appeals boards. . ."[2]

The gravamen of the court's error in permitting appellants' suit against the county to go forward is its willingness to engage in premature review of the actions of the local zoning authority based on almost nonexistent factual allegations of a constitutional dimension. It cannot be the case that the role of the federal courts is to review decisions of local zoning authorities where the complaining parties have failed to plead, in a well-pleaded complaint, a substantial federal question. The law governing federal subject matter jurisdiction simply does not permit such exercise of authority. Even as a practical matter, "[a]vailability of federal review of every zoning decision would only serve to further congest an already overburdened federal court system."[3]

On the issue of ripeness, it is obvious that if we affirm the skeletal pleadings in this case, we are opening the doors of the federal courts to review virtually all Florida zoning rulings, whether or not final and definitive for purposes of establishing ripeness.[4] Therefore, I would hold with the seventh, ninth, and tenth circuits that the *Williamson County* and *MacDonald* ripeness test applies with equal force to as applied arbitrary and capricious due process[5] and equal protection claims. I would dismiss without prejudice all counts of appellants' complaint for failure sufficiently to allege facts establishing either a constitutional issue or ripeness.

In reaching this conclusion, I recognize that under our liberal pleading requirements, a complaint should not be dismissed unless the plaintiff can prove no set of facts that would entitle her to relief.[6] However, it is essential to plead sufficient jurisdictional facts,[7] and the complaint in this case completely fails to satisfy this threshold requirement. Based upon the law of this circuit and the failure of appellants to allege facts sufficient to raise a substantial federal question or to establish ripeness, it is clear that appellants have established no right to relief. Therefore, I would affirm on jurisdictional grounds the district court's dismissal of the complaint.

II. FACTS

Because I disagree with the majority's rendering of the facts, and its determination of the threshold questions 1) whether appellants have pleaded a substantial federal question and 2) whether appellants' equal protection and arbitrary and capricious due process claims are ripe, I undertake a separate review of those facts as set forth by the appellants in their pleadings. On review of the district court's dismissal of the complaint for failure to state a claim, appellants' allegations are regarded as true.[8]

On April 1, 1982, Martin County enacted a comprehensive land use plan (Comprehensive Plan or the Plan) setting forth land use designations for all property within Martin County. The Plan contained an amendment procedure permitting property owners to apply for changes in land use designation. A rezoning application must be filed with any amendment sought.

On July 17, 1986, appellant Executive 100 purchased property in Martin County at the northwest corner of the intersection of Interstate 95 and County Road 714. At the time appellant purchased this property, it was zoned rural ranchette, a residential designation permitting one unit per five acres. On January 23, 1985, appellant Kings Ridge 239, Inc. (Kings Ridge) also purchased property in Martin County. Its property, located between the Florida Turnpike and Interstate 95 at the intersection of County Road 708, was zoned agricultural when purchased. Significantly, then, pursuant to Martin County's Comprehensive Plan, appellants' properties were zoned rural ranchette and agricultural when purchased in early 1985 and 1986 and remain so today.

In September 1987, Executive 100 applied for an amendment to the Comprehensive Plan to change its zoning designation from rural ranchette to light industrial. At the same time, Kings Ridge applied for an amendment to the Plan to have its property rezoned form agricultural to industrial. Appellants each filed the required rezoning application. The Martin County Planning and Zoning Board and the Martin County Commission denied appellants' applications. Appellants do not allege that they ever reapplied for less ambitious rezoning or, as an alternative to rezoning, sought a greater density allowance or variances from

the Comprehensive Plan. They claim only that no other variance or exception procedure exists through which they can urge reconsideration.

Appellants, in their complaint, allege a violation of 42 U.S.C. § 1983 and the Fourteenth Amendment. They claim, generally, that the value of their properties has been significantly diminished and that Martin County's actions have intimidated potential purchasers from negotiating with appellants for the purchase of the property that is the subject of this action. On their equal protection claims, counts two and seven, they allege that "the Defendants have permitted the owners of other properties, similarly situated in all material respects to the subject property, to develop their properties for non-residential purposes."[9] However, as discussed below, appellants do not allege how these other properties are, in fact, similarly situated or whether the "permitted" non-residential zoning occurred prior to the April, 1982 adoption of the Comprehensive Plan.

In claiming an arbitrary and capricious denial of due process, counts three and eight, appellants allege that

> precluding industrial use of the subject property is arbitrary and unreasonable, has no reasonably debatable relationship to the public health, welfare, safety or morals, is inconsistent with surrounding areas and uses and is more strict or severe than necessary.[10]

They contend, without elaboration, that "because of its location, size and shape, the subject property is unsuitable for use for residential purposes."[11]

Appellants also allege that until this controversy is resolved, they cannot use, develop or sell the subject properties.[12] However, it is unclear from their pleadings how this could be true. The property is zoned agricultural and rural ranchette and was purchased as zoned. There is no allegation as to how the land became unsuitable or impossible to develop between the time it was purchased and the present time. Nor do appellants allege that defendant Martin County prevented them from developing their property consistent with zoning existing at the time of purchase.

Additional facts, pertinent to specific allegations in the complaint, are set forth below.

III. DISCUSSION

A. Failure to Plead a Substantial Federal Question.

The initial question raised on appeal, yet ignored by the court, is whether appellants have alleged a federal question sufficient to invoke federal jurisdiction. "In this regard, a liberal standard guides the trial court in determining whether the question is substantial enough to invoke federal jurisdiction... A complaint should be dismissed only where the federal question is so 'unsubstantial implausible, foreclosed by prior decisions, or otherwise completely devoid in its merits as not to involve a federal controversy.' "[13] Because I agree with the majority that appellants' due process takings and just compensation claims are not ripe, I address the substantiality of the federal question raised only with regard to the arbitrary and capricious due process and equal protection claims.

1. As Applied Equal Protection Claim. Appellants, in claiming a denial of equal protection, allege unequal administration of a facially neutral zoning plan.[14] They claim that appellees intentionally discriminated against them and in favor of other similarly situated property owners in redesignating those similarly situated properties for non-residential use while denying appellants' applications for similar changes in zoning.[15]

However, a more careful reading of the complaint plainly reveals that appellants have alleged no facts even remotely suggesting *how* appellants and other landowners were, in fact, similarly situated prior to rezoning by the zoning authority of property other than that owned by appellants. Indeed, the only description of the similarity of the parcels in question in relation to other properties is that they are adjacent to Interstate 95. The mere allegation that other landowners are "similarly situated in all material respects" simply cannot, by any stretch of the imagination, constitute a well-pleaded complaint under the Equal Protection Clause of the Fourteenth Amendment.

Indeed, nowhere in the complaint do appellants allege a

change as drastic as that at issue here was permitted on similarly situated properties; that is, that property zoned rural ranchette or agricultural under the county's Comprehensive Plan was subsequently rezoned industrial or light industrial. Nowhere in the complaint do appellants specifically allege how other properties are similar in all material respects to the property that is the subject of this action. And, nowhere in the complaint do appellants allege whether the "permitted" non-residential rezoning of other properties occurred before or after the adoption of the Comprehensive Plan. If, as it appears by the sketchy allegations in appellants' complaint, the property rezoned by the county (at an unspecified time) in favor of other landowners was not originally zoned as rural ranchette or agricultural, then the property was not similarly situated to appellants' property for purposes of establishing a denial of equal protection. Thus, for example, a decision by Martin County to permit rezoning of already commercially zoned land for industrial development simply does not result in different treatment of similarly situated properties.

It is beyond question that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."[16] As this court has recognized with regard to differential treatment of landowners by zoning boards, "[d]ifferent treatment of dissimilarly situated persons does not violate the equal protection clause."[17] Because appellants here have failed sufficiently to allege a "classification of similarly situated persons caused by intentional or purposeful discrimination,"[18] they cannot claim a denial of equal protection.

Moreover, appellants do not claim that they were denied the change in zoning because they were members of a suspect or even a quasi-suspect group.[19] Nor can it be said that the change in zoning was a "fundamental right."[20] Plaintiffs allege merely that in denying their application for rezoning while redesignating the property of others on its own initiative, the Board denied the appellants equal protection by acting arbitrarily and intentionally.[21]

To succeed on their claim of unconstitutional denial of equal protection, appellants must demonstrate that they were treated differently as the result of actions that did not "rationally ad-

vanc[e] a reasonable and identifiable government objective."[22] Appellants, in this case, however, have failed even to allege facts sufficient to withstand a motion to dismiss their claim of denial of equal protection.

The pleading requirement, as articulated by the majority, would permit any landowner successfully to plead a denial of equal protection every time a zoning authority draws a line at a particular point to require more restrictive use of the property on one side of the line than on the other. However, "[t]he law is well settled that legislated zoning ordinances are permissible, constitutional uses of police power and are not reviewable by district courts unless they are *'clearly arbitrary and unreasonable,* having no substantial relation to the public health, safety, morals, or general welfare.'"[23] As this court clearly has stated, it is upon a "*factual showing* of arbitrariness" that this court will inquire whether there is "some basis in fact and law to justify the zoning action as consistent with reasonableness."[24] Claims that the county's decisions "in reviewing and denying Plaintiffs' requests have been made with malice toward the Plaintiff, have been made with reckless disregard for the rights of the Plaintiff, have been arbitrary, have been capricious, willful and wanton," are not factual allegations.[25] Absent factual allegations of arbitrariness, we do not reach the question whether the actions of the zoning authority were reasonable.

Because I would hold that appellants have failed to allege facts sufficient to raise a substantial federal question, I would dismiss appellants' equal protection claim. On this basis, I dissent from the majority's holding that the equal protection claim was sufficiently pled to establish a federal constitutional question.

2. As Applied Arbitrary and Capricious Due Process Claim. Because I find that appellants have failed to establish a constitutionally cognizable deprivation of property, I respectfully dissent from that portion of the court's opinion reversing the district court's dismissal of the arbitrary and capricious due process claim.

In reviewing the district court's dismissal of that portion of the complaint alleging an arbitrary and capricious denial of due process, this court must determine whether, accepting the allega-

tions in the plaintiffs' complaint as true, the action by the zoning authority is an abuse of governmental power sufficient to allege a constitutional violation.[26] "Although 42 U.S.C. § 1983 is a species of tort law, not every violation of state or local law by a governmental body or governmental actor constitutes an invasion of federally protected rights. Plaintiff in order to prevail must show a constitutional violation."[27] Note, also, that the actions of zoning commissions are entitled to a presumption of constitutional validity.[28]

To state an arbitrary and capricious due process claim in the context of section 1983, plaintiffs must prove, first, that there has been a deprivation of a federal constitutionally protected interest, and second, that the deprivation, if any, resulted from an abuse of governmental power sufficient "to raise an ordinary tort . . . to the stature of a violation of the Constitution."[29]

The plaintiffs allege that the value of their property has been diminished significantly by the Board's denial of their zoning request. Appellants further allege that they cannot sell their property. The majority holds that plaintiffs can establish a property deprivation by showing that this alleged diminution in the value of their property was more than a simple fluctuation in value incident to governmental decisionmaking. There is no basis in law for this holding. Under the first prong of the test set forth in *Rymer* and reiterated in *Greenbriar,* appellants have failed to show that they were deprived of a constitutionally cognizable property interest without due process of law.

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person *has already acquired* in specific benefits."[30] To have a property interest, a person "clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[31] Similarly, the Supreme Court has recognized that, while zoning, by its nature "interferes" significantly with owners' uses of property, "[i]t is hornbook law that '[m]ere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or to entitle him to a variance or

rezoning.'"[32]

First Evangelical Lutheran Church v. County of Los Angeles, cited by the majority, does not hold otherwise. In that case, the Supreme Court recognized that "'[a] reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project,' but '[s]uch changes in value are incidents of ownership.'"[33] The Court held only that "where the government's activities have already worked a taking of *all use of property*, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[34] Similarly, the Court in *Penn Central Transportation Co. v. New York City*[35] previously had recognized that the denial of the most profitable use of property is not a taking. The Court, there, in considering whether refusal by the Landmarks Preservation Commission to approve plans for construction of a building over Grand Central Terminal constituted a taking, emphasized that it could not determine whether a taking had occurred until it knew "that appellants will be denied any use of any portion of the airspace above the Terminal."[36]

To determine whether appellants have a cognizable interest in having their property rezoned industrial, we look to state law.[37] Under Florida law, a property owner has no vested interest in either an existing zoning classification or in a zoning classification subsequently sought.[38] Similarly, absent a showing that the property as zoned at the time of purchase was not suited for the purpose for which it was zoned, one who has acquired property for a purpose known to be prohibited by the current zoning ordinance cannot contend that a zoning change is needed to prevent confiscation of his property.[39] A zoning ordinance is not confiscatory because a single reasonable use is denied.[40]

The issue is similar to that in *United Land Corporation v. Clarke*,[41] in which developers claimed that the county zoning administration and county attorney denied them due process by refusing to issue a soil erosion permit. The district court dismissed their complaint, holding that plaintiffs had no legitimate claim of entitlement to the permit. The court of appeals, in affirming the district court's dismissal of the complaint under 42

U.S.C. § 1983, held that where no property interest existed in the issuance of the erosion control permit, action taken by the zoning administration and the county attorney did not infringe the developers rights secured by the Fourteenth Amendment.[42] *United Land Corporation*, and the case before this court, should be contrasted with *Wheeler v. Pleasant Grove*,[43] in which plaintiffs, in reliance on a previously obtained and issued land use permit, began construction on the property in question. There, the fifth circuit held that a subsequent ordinance that effectively revoked permission to build was a confiscatory taking of the permit itself because of plaintiff's prior reliance on the issued permit.

Appellants in this case have not shown that they had a protectible property interest in having their rezoning application approved. Pursuant to Martin County's Comprehensive Plan, their property was zoned rural ranchette and agricultural *when they purchased it*, and it remains so today. The purchase price of the property presumably reflected the market value of the property *as zoned* at the time of purchase. Appellants contention that they cannot use, develop, or sell the properties in question is patently implausible; any hardship resulting from the present zoning designation is self-imposed.

Because appellants allege only that the diminution in property value incident to the Board's denial of their application for a change in zoning denied them due process of law, appellants have not alleged an infringement of property rights secured by the Fourteenth Amendment. I, therefore, would reject appellants' attempt to bootstrap their zoning claims into federal court by attempting to state a constitutional violation.

B. Ripeness

Ripeness, as this court has noted, "goes to whether the district court had subject matter jusisdiction."[44] Thus, yet another threshold inquiry on review is whether, as a jurisdictional issue, appellants' claims against the county are ripe. On the ripeness issue, we review de novo, as a question of law, the district court's application of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*.[45]

Because I agree that appellants' due process taking and just

compensation claims are premature under the Supreme Court's decision in *MacDonald, Sommer & Frates v. County of Yolo*[46] and *Williamson County,* I consider below only whether appellants' equal protection and arbitrary and capricious due process claims are ripe for review.

The majority relies on a footnote in this court's recent decision in *Eide v. Sarasota County*[47] to hold that the reapplication requirement of *MacDonald* "has no bearing on as applied arbitrary and capricious due process claims."[48] However, the landowner in *Eide* had failed to submit to the zoning authority "even a single plan for the commercial development of his property,"[49] and on this basis was denied relief. Also, "he [had] not submitted a petition to rezone his properties from their present residential zoning to commercial zoning."[50] The county, therefore, had not been given even a first opportunity to apply the sector plan to the property owner's property. The fact that *Eide* had failed to *reapply* for some change in zoning, then, was irrelevant to the holding of that case. I, therefore, would hold that we are not bound by dicta in the *Eide* footnote.

I also would reject the reasoning behind the *Eide* court's determination that landowners claiming a denial of substantive due process or equal protection need not reapply to the zoning authority to determine what extent of development will be permitted. In so concluding, I adopt the reasoning of the seventh, ninth, and tenth circuits that the finality requirement applied by the Court in *MacDonald* and *Williamson County* to takings and just compensation claims "applies as well to equal protection and due process claims."[51]

The court in *Eide,* and this court in its reliance on *Eide,* completely misconstrue the nature of the ripeness inquiry. In *Eide,* the court reasoned that the *MacDonald* reapplication requirement does not apply to an as-applied arbitrary and capricious due process claim because the landowner "does not allege the deprivation of all beneficial use of his land, and, therefore, a court does not need the additional determination in order to adjudicate his claim."[52] However, the core of the Supreme Court's jurisprudence on the ripeness issue is "an insistence on knowing the nature and extent of permitted development before

adjudicating the constitutionality of the regulation that purports to limit it."[53] Constitutional challenges of land use decisions, the Court has held, are "ripe for review" when the aggrieved party has received the zoning authority's "'*final, definitive* position regarding how it will apply the regulations at issue to the particular land in question.'"[54] This final and authoritative determination must expose the "nature and extent of permitted development."[55] Appellants, here, have not yet sought from Martin County a final determination of how their land may be used.

The Fourteenth Amendment requires that "[n]o State shall . . . deprive any person of . . . property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."[56] Thus, each of appellants' claims, whether denominated as a takings claim, a denial of equal protection, or arbitrary and capricious denial of due process has as its gravamen the deprivation of a property interest. And, where the question before the court is whether denial of that interest by the zoning board was arbitrary and capricious,

> [u]ntil it has a final action before it, a court is unable to evaluate whether property was taken and whether the local authorities position was arbitrary. Thus, the *Williamson County* ripeness test applies with equal force to substantive due process claims.[57]

Similarly, on the denial of equal protection, it cannot be determined whether the Board acted irrationally in differently treating similarly situated landowners until the complaining landowners have received a "final and authoritative" determination exposing the "nature and extent of permitted development."[58] As the ninth circuit in *St. Clair v. Chico* reasoned, after first acknowledging that the same ripeness test applies generally to constitutional challenges of land use regulations,[59]

> The purpose of the ripeness doctrine is to avoid premature judicial review of administrative action. This goal is accomplished by deferring review of a planning commissions' land use decisions until they represent a '"final, definitive position regarding how it will apply the regulations

> at issue to the particular land in question.'" *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351, 106 S.Ct. 2561, 2567, 91 L.Ed.2d 285 (1986) (quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191, 105 S.Ct. 3108, 3119, 87 L.Ed.2d 126 (1985)). The finality requirement is satisfied only if the planning commission first rejects a "development plan" and then denies a variance from its regulations. *E.g., Herrington*, 857 F.2d at 569; *Kinzli*, 818 F.2d at 1454.[60]

Thus, "regardless of the type of claim, it is generally impossible to determine the extent of the infringement absent a final determination by the relevant governmental body."[61]

As this court acknowledged in *Eide v. Sarasota County*, "[d]ecisions on ripeness issues are fact-sensitive."[62] In this case, as the majority correctly observes, "the plaintiffs do not allege that they have sought variances or pursued alternative, less ambitious development plans."[63] And, as the ninth circuit in *St. Clair* explained, "[t]his two-step test can be avoided only if compliance would be futile, and even then only if the property owner first makes at least one '"meaningful application."'"[64] Although appellants here allege that there is no other variance or exception prodecure available to urge reconsideration,[65] they cannot rely on the futility exception because they have failed to make "meaningful application."[66] A meaningful application, the *MacDonald* Court noted, does not include a request for "exceedingly grandiose development."[67] Here, as the majority acknowledges, "less ambitious development plans" could have been pursued. Moreover, "mere allegations by a property owner that it has done everything possible to obtain acceptance of a development proposal will not suffice to prove futility."[68] Nowhere in their complaint do appellants set forth factual allegations sufficient to plead futility. Thus, for example, they do not allege how, in fact, they are barred from applying for an amendment to the Comprehensive Plan to change their zoning requirements from rural ranchette or agricultural to commercial.

Denial, by the zoning authority, of the extreme rezoning requested by appellants does not preclude less intensive, but still valuable development.[69] "The local agencies charged with

administering regulations governing property development are singularly flexible institutions; what they take with one hand they may give back with the other."[70] The complaining property owner, therefore, "has a high burden of proving that a final decision has been reached by the agency before it may seek compensatory or injunctive relief in federal court on federal constitutional grounds."[71] Certainly, the property owner must apply for something other than an extreme change in zoning.

To determine at this time whether the action of the Board was arbitrary and capricious would be premature. Such an inquiry would require us to speculate what applications appellants might have filed with the Board and how the Board might have responded to these hypothetical petitions. "It is precisely this type of speculation that the ripeness doctrine is intended to avoid."[72] Because no meaningful application has been submitted, the Board has not been permitted to make a final determination regarding allowable development of the property at issue. Therefore, appellants' equal protection and as-applied arbitrary and capricious due process claims are not ripe for federal adjudication.[73]

C. Pendent State Law Claim

United Mine Workers v. Gibbs[74] recognized that if a federal claim against a party is dismissed before trial, the pendent state law claim often should be dismissed as well. Because I would dismiss as premature all of the federal claims on appellees' motion to dismiss, I would hold that appellants' pendent state law claims also should be dismissed.[75]

IV. CONCLUSION

Appellants simply have not alleged a substantial federal question. In alleging a denial of substantive due process, appellants cannot, as a matter of law, establish that they have a protectible property interest in having their rezoning application approved. Their equal protection claim also falls because they have failed sufficiently to allege that the county treated them differently than other similarly situated property owners. Neither have they made any "factual showing"[76] that the actions of the county in denying their rezoning application were "clearly

arbitrary and unreasonable."[77] Therefore, I dissent from that portion of the court's decision permitting appellants' equal protection and arbitrary and capricious due process claims to go forward.

I also would hold with the seventh, ninth, and tenth circuits that the *Williamson County* and *MacDonald* ripeness test applies to equal protection and arbitrary and capricious due process claims. Appellants in these cases have not alleged that they sought variances or pursued alternative, less ambitious development plans. And, as the Supreme Court's decision in *MacDonald* indicates, this is exactly the kind of review the ripeness doctrine was designed to prevent. For the reasons stated above, I dissent from that portion of the court's opinion permitting appellants' equal protection and arbitrary and capricious due process claims to go forward. Because all the federal claims drop out, I also would dismiss appellants' pendent state law claims.

FOOTNOTES

* Honorable Wesley E. Brown, Senior U.S. District Judge for the District of Kansas, sitting by designation.

1. Rural Ranchette allows development at one house per five acres.

2. Plaintiffs sued the Board members, in their official and individual capacities, and Martin County. We refer to the defendants collectively as the "Board."

3. The district court relied on the intermediate appellate court opinion in *Joint Ventures*. *See Joint Ventures, Inc. v. Dept. of Transp.*, 519 So.2d 1069 (Fla.Dist.Ct.App.1988). The Florida Supreme Court's opinion, cited above, quashed the intermediate court's opinion. *Joint Ventures*, at 629. The Florida Supreme Court recognized, however, that a property owner has the right to bring an inverse condemnation proceeding in response to an alleged regulatory taking. *Id.*, at 622.

4. The court, in an alternative holding as to counts five and ten, found that if plaintiffs' interference with prospective economic opportunity claim was based on state law, it failed to allege the necessary element of a contract or business relationship with prospective customers.

5. The plaintiffs do not challenge the district court's holding that the Board members are entitled to legislative immunity under *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 404, 99 S.Ct. 1171, 1178-79, 59 L.Ed.2d 401 (1979), and *DeSisto College v. Line*, 888 F.2d 755, 765 (11th Cir.1989).

6. Each count asks for an order declaring that prohibiting the plaintiffs from using their land for industrial purposes violates plaintiffs' rights. Each count also asks for an injunction enjoining the "county" from enforcing the County Comprehensive Land Use Plan. Counts one and six ask for compensatory damages against the individual defendants, and counts one, two, five, six, seven, and ten ask for punitive damages against the individual board members.

7. Accordingly, we do not reach the issue of whether suits against officials for prospective injunctive relief may be brought only against defendants in their official capacities.

8. The Fifth Amendment provides in part:
   > [P]rivate property [shall not] be taken for public use, without just compensation.

   U.S. Const.Amend. V.

9. This Circuit further distinguishes between "facial" arbitrary and capricious due process challenges, *see Eide*, 722, and "as applied" arbitrary and capricious due process challenges. *Id.*

FOOTNOTES — Continued

10. This Circuit distinguishes between equal protection challenges to a statute "on its face," and challenges to a statute "as applied to the property involved." *Eide*, at 722.

11. Counts one and six appear to state due process takings claims. Counts three and eight allege that the present zoning of the plaintiffs' parcels is unreasonable, which appear to be as applied arbitrary and capricious substantive due process claims. *See Eide*, at 721. We separately analyze these "due process" claims.

12. This Circuit has not resolved the issue of whether a property owner also must pursue state procedures for obtaining just compensation before a due process takings claim is ripe for adjudication. *See Eide*, at 721.

13. Plaintiffs claim that *Williamson County* should not apply to their just compensation claim because they do not have a "viable" inverse condemnation claim. This appears to be nothing more than a concession that their claim of a taking is meritless because the Board has not deprived the plaintiffs of all use of their property. Accordingly, this argument lacks merit.

FOOTNOTES — Continued

1. *Stansberry v. Holmes*, 613 F.2d 1285, 1288 (5th Cir.), *cert. denied*, 449 U.S. 886, 101 S.Ct. 240, 66 L.Ed.2d 112 (1980)

2. *Nasser v. Homewood*, 671 F.2d 432, 440 (11th Cir.1982) (citing *South Gwinnett Venture v. Pruitt*, 491 F.2d 5, 6 (5th Cir.) (en banc), *cert. denied* 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974)).

3. *Scudder v. Greendale*, 704 F.2d 999, 1003 (7th Cir.1983) (citation omitted).

4. *See MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351, 106 S.Ct. 2567, 91 L.Ed.2d 285 (1986).

5. As our court in *Eide v. Sarasota County* noted, 908 F.2d 716, 722 n. 9 (11th Cir.1990), most courts describe this claim simply as a substantive due process claim. This terminology, the court noted, "has contributed to the confusion between an arbitrary and capricious due process claim and a due process takings claim." *Id.* For clarity and consistency, therefore, I refer to this claim as an "arbitrary and capricious due process" claim. Whatever the label, the issue is the same: "Substantive due process protects a general right of an individual to be free from the abuse of governmental power." *Rymer v. Douglas County*, 764 F.2d 796, 802 n. 4 (11th Cir.1985).

6. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

7. *See Ex parte Poresky*, 290 U.S. 30, 31-32, 54 S.Ct. 3, 4-5, 78 L.Ed. 152 (1933) ("In the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented.")

8. *Cooper v. Pate*, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964); *Bracewell v. Nicholson Air Services, Inc.*, 680 F.2d 103, 104 (11th Cir.1982).

9. Complaint, ¶ 42.

10. Complaint, ¶ 46.

11. Complaint, ¶ 47.

12. Complaint, ¶ 27.

13. *Doe v. Public Health Trust*, 696 F.2d 901, 907 (11th Cir.1983) (Hatchett, J., specially concurring) (citations omitted).

14. *See Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1944); *E & T Realty v. Strickland*, 830 F.2d 1107, 1112-13 (11th Cir.1987).

15. *See E & T Realty*, 830 F.2d 1107 (claim of unequal administration of facially neutral legislation requires showing of intentional discrimination; mere error or mistake in judgment does not violate equal protection).

FOOTNOTES — Continued

16. *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940).

17. *E & T Realty*, 830 F.2d at 1109.

18. *Muckway v. Craft*, 789 F.2d 517, 523 (7th Cir.1986).

19. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216-218, 102 S.Ct. 2382, 2396, 72 L.Ed.2d 786 (1982).

20. *See, e.g., id.*

21. *See, e.g., Reed v. Reed*, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442, 102 S.Ct. 1148, 1161, 71 L.Ed.2d 265 (Blackmun, J. concurring).

22. *Schweiker v. Wilson*, 450 U.S. 221, 235, 101 S.Ct. 1074, 1083, 67 L.Ed.2d 186 (1981); *see also Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (because mental retardation is not a quasi-suspect classification, standard of review is no higher than is normally accorded economic and social legislation).

    This circuit has uniformly applied the rationality standard to equal protection challenges of city zoning ordinances and denials of applications for property rezoning. *See Grant v. County of Seminole*, 817 F.2d 731, 737 (11th Cir.1987); *Nasser*, 671 F.2d at 441; *Couf v. DeBlaker*, 652 F.2d 585, 588-90 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1278, 71 L.Ed.2d 462 (1982); *Stansberry v. Holmes*, 613 F.2d 1285, 1289 (5th Cir.1980); *South Gwinnett Venture v. Pruitt*, 491 F.2d 5, 6 (5th Cir.) (en banc), *cert. denied* 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974); *Higginbotham v. Barrett*, 473 F.2d 745, 747 (5th Cir.1973).

23. *Grant*, 817 F.2d at 736 (emphasis added) (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926)); *see also Greenbriar, Ltd. v. Alabaster*, 881 F.2d 1570, 1577 (11th Cir.1989); *Nasser*, 671 F.2d at 440-41; *Couf*, 652 F.2d at 590; *South Gwinnett Venture*, 491 F.2d at 7; *Higginbotham*, 473 F.2d at 747.

24. *South Gwinnette Venture*, 491 F.2d at 7.

25. *See e.g., Estate of Himelstein v. Ft. Wayne*, 898 F.2d 573, 578 (7th Cir.1990) (plaintiffs' complaint alleging that "[a]ll of the Defendants' acts were done knowingly, willfully and maliciously," with the intention of depriving plaintiffs of equal protection should be dismissed for failure to allege any facts in support of their claim).

26. *Rymer v. Douglas County*, 764 F.2d 796, 803 (11th Cir.1985).

27. *Id.* at 800 (citing *Williams v. Kelley*, 624 F.2d 695, 697 (5th Cir.1980), *cert. denied*, 451 U.S. 1019, 101 S.Ct. 3009, 69 L.Ed.2d 391 (1981)).

FOOTNOTES — Continued

28. *South Gwinnett*, 491 F.2d at 7. *See also Indialantic v. McNulty*, 400 So.2d 1227 (Fla. 5th Dist.Ct.App.1981) (under separation of powers doctrine, zoning decisions are primarily legislative in nature and should be made by zoning authorities accountable to their constituents; courts are not "super" zoning review boards).

29. *Williams v. Kelley*, 624 F.2d 695, 697 (5th Cir.1980); *see Rymer*, 764 F.2d at 803 (setting forth two-part test); *Greenbriar*, 881 F.2d at 1577 (applying two-part test to decision of zoning authority denying rezoning request).

30. *Board of Regents v. Roth*, 408 U.S. 564, 576, 92 S.Ct. 2701, 2708, 33 L.Ed.2d 548 (1972) (emphasis added).

31. *Id.* 408 U.S. at 577, 92 S.Ct. at 2709. *See also Marine One, Inc. v. Manatee County*, 877 F.2d 892, 894 (11th Cir.1989) (threshold determination is whether property owners "have a property interest protected by the Constitution").

32. *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 674 n. 8, 96 S.Ct. 2358, 2362 n. 8, 49 L.Ed.2d 132 (1976) (quoting 8 E. McQuillan, Municipal Corporations § 25.44, at 111 (3d ed. 1985); *see also Goldblatt v. Hempstead*, 369 U.S. 590, 592, 82 S.Ct. 987, 989, 8 L.Ed.2d 130 (1962) (ordinance may lawfully prohibit best and most beneficial use).

33. *First Lutheran Church*, 482 U.S. 304, 320, 107 S.Ct. 2378, 2388, 96 L.Ed.2d 250 (1987) (quoting *Danforth v. United States*, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240 (1939)).

34. *Id.* 482 U.S. at 321, 107 S.Ct. at 2389.

35. 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

36. *Id.* at 137-38, 98 S.Ct. at 2665-66.

37. *Board of Regents v. Roth*, 408 U.S. at 577, 92 S.Ct. at 2709 (property interests are created, not by the Constitution, but by "an independent source such as state law"); *Marine One*, 877 F.2d at 894.

38. *See Gainesville v. Cone*, 365 So.2d 737, 739 (Fla.App. 1 Dist.1978) (because no property interest existed in continuation of existing zoning or in new zoning classification applied for, city could amend land use plan of such property to conform to prior zoning classification; *Epifano v. Town of Indian River Shores*, 379 So.2d 966 (Fla.App. 4 Dist.1979) (no vested right to certain zoning).

39. *Broward County v. Capeletti Bros., Inc.* 375 So.2d 313 (Fla. 2d Dist.Ct.App.1979).

40. *Id.* at 315.

41. 613 F.2d 497 (4th Cir.1980).

FOOTNOTES — Continued

42. *Id.* at 501 (citing *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)); *see also Hollywood v. Hollywood Beach Hotel Co.*, 283 So.2d 867 (Fla.App. 4 Dist.1973), *aff'd in part and rev'd in part on other grounds*, 329 So.2d 10 (Fla.1976).

43. 664 F.2d 99 (5th Cir.1981), *cert. denied*, 456 U.S. 973, 102 S.Ct. 2236, 72 L.Ed.2d 847 (1982).

44. *Greenbriar*, 881 F.2d at 1573.

45. 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); *see East-Bibb Twiggs Neighborhood Association v. Macon Bibb Planning & Zoning Comm'n*, 896 F.2d 1264, 1266 (11th Cir.1989) (citing *Georgia Power Co. v. Baker*, 830 F.2d 163, 165 (11th Cir.1987)); *Atlantic Land & Improv. Co. v. United States*, 790 F.2d 853, 857 (11th Cir.1986)).

46. 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986).

47. 908 F.2d 716, 725 n. 16 (11th Cir.1990).

48. Opinion, slip op. at 1913 at ———.

49. *Eide*, 908 F.2d at 726.

50. *Id.*

51. *Herrington v. County of Sonoma*, 834 F.2d 1488, 1494, (9th Cir.1987). *See also Unity Ventures v. County of Lake*, 841 F.2d 770, 774-76 (7th Cir.1988); *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 722 (10th Cir.1989).

    Other ninth circuit opinions affirming application of *MacDonald* and *Williamson County* to equal protection and as-applied arbitrary and capricious due process claims include *Southern Pacific Transp. Co. v. City of Los Angeles*, —— F.2d —— (9th Cir.1990); *Sinaloa Lake Owners Ass'n v. Simi Valley*, 882 F.2d 1398, 1404 (9th Cir.1989); *St. Clair v. Chico*, 880 F.2d 199 (9th Cir.1989); *Engel v. Clark County*, 878 F.2d 1438 (9th Cir.1989) (table); *Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir.1989); *Shelter Creek Dev. Corp. v. Oxnard*, 838 F.2d 375 (9th Cir.1988); *Kinzli v. Santa Cruz*, 818 F.2d 1449 (9th Cir.1987).

52. *Eide*, 908 F.2d at 725 n. 16.

53. *MacDonald*, 477 U.S. at 351, 106 S.Ct. at 2567-68.

54. *Id.* (quoting *Williamson County*, 473 U.S. at 191, 105 S.Ct. at 3119) (emphasis added).

55. *Id.*, 106 S.Ct. at 2567; *see also Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145-46 (9th Cir.1986).

56. U.S. Const.Amend. XIV, § 1.

FOOTNOTES — Continued

57. *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 722 (10th Cir.1989) (citing *Williamson County*, 473 U.S. at 199-200, 105 S.Ct. at 3123; *Herrington v. Sonoma Couty*, 857 F.2d 567, 569 (9th Cir.1988); *Norco Const. Co.*, 801 F.2d at 1145)).

58. *MacDonald*, 477 U.S. at 350, 106 S.Ct. at 2566-67.

59. 880 F.2d 199, 202 (9th Cir.1989).

60. *Id.* at 202-03.

61. *Sinaloa Lake Owners Ass'n*, 882 F.2d at 1404.

62. 908 F.2d 716, 727 (11th Cir.1990).

63. Opinion, slip op. at 1912-1913, at —— - ——.

64. 880 F.2d at 203; *see also Herrington*, 834 F.2d at 1495.

65. Complaint ¶¶ 19-20, 22-23.

66. *Herrington*, 857 F.2d at 569; *Kinzli*, 818 F.2d at 1454-55.

67. 477 U.S. at 353 n. 9, 106 S.Ct. at 2568 n. 9.

68. *Herrington*, 834 F.2d at 1496.

69. *MacDonald*, 477 U.S. at 353, 106 S.Ct. at 2569.

70. *Id.* at 350, 106 S.Ct. at 2567.

71. *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir.1989).

72. *Southern Pacific Transp. Co. v. City of Los Angeles*, —— F.2d ——, —— (9th Cir.1990).

73. It is clear that appellants need not have pursued state remedies in order for their arbitrary and capricious due process or equal protection claims to be ripe. First, the issue in not one of exhaustion of state remedies. *See Williamson County*, 473 U.S. at 192, 105 S.Ct. at 3119 ("the question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable"); *id.* at 193, 105 S.Ct. at 3120 ("While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, . . . respondent would not be required to resort to those procedures before bringing its § 1983 action, because those procedures clearly are remedial."). The requirement in *Williamson County* that appellants exhaust available state compensation remedies before pursuing their claim in federal court derives not from any

FOOTNOTES — Continued

exhaustion requirement but from "the special nature of the Just Compensation Clause." *Williamson County*, 473 U.S. at 196 n. 14, 105 S.Ct. at 3121 n. 14. As the ninth circuit has explained, this requirement "states only that the just compensation clause cannot be violated until the state has subsequently declined to pay for the taking; it has no application to other types of constitutional claims, even where those claims arise out of facts that also give rise to a taking claim." *Sinaloa Lake Owners Ass'n*, 882 F.2d at 1404. *See also Eide*, 908 F.2d at 725-26 n. 16 ("[T]he just compensation hurdle applied in the just compensation claim context does not apply to arbitrary and capricious due process claims. . . . The reason for this is that an arbitrary and capricious act by a government is unconstitutional even if the government pays just compensation."). The injury has occurred regardless of the availability of a state procedure for compensation of that injury. In fact, the Supreme Court in *Williamson County* explicitly distinguished procedural due process claims from takings claims reasoning that due process may be violated regardless of the availability of post-deprivation remedies. 473 U.S. at 195-96 n. 14, 105 S.Ct. at 3121 n. 14.

Again, however, because appellants have not satisfied the finality requirement, we need not reach the question whether they also must satisfy the just compensation requirement.

74. 383 U.S. 715, 726, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966).

75. *See also Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 725 (10th Cir. 1989) (given early stage at which the federal claims are dismissed, pendent state law claims also should be dismissed.).

76. *South Gwinnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974).

77. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926).

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 89-5629

D.C. Docket No. 88-14188-CIV-JAG

EXECUTIVE 100, INC., a Florida Corporation, KINGS RIDGE 239, INC., a Florida corporation,

Plaintiffs-Appellants,

versus

MARTIN COUNTY, A Political Subdivision of the State of Florida, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before JOHNSON and CLARK, Circuit Judges, and BROWN*, Senior District Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court apealed from in this cause be and the same is hereby AFFIRMED in part and REVERSED in part;

IT IS FURTHER ORDERED that each party bear their own costs on appeal.

CLARK, Circuit Judge, concurred in part and dissented in part and filed an opinion.

*Honorable Wesley E. Brown, Senior U.S. Disttrict Judge for the District of Kansas, sitting by designation.

Entered: February 7, 1991
For the Court: Miguel J. Cortez, Clerk
s/Kenley
By: Kenley, Deputy Clerk

ISSUED AS MANDATE: As to all defendants-appellees except Martin County on April 4, 1991.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

EXECUTIVE 100, INC., etc., and
KINGS RIDGE 239, INC., etc.,
Plaintiffs,

v. Case no. 88-14188-CIV-JAG

MARTIN COUNTY, etc., JOHN HOLT, JR., FRANK WACHA, TOM KENNY, TOM HIGGINS, MARGARET HURCHALLA, etc.,
Defendants.

ORDER

THIS CAUSE has come before the court upon the defendants' motion to dismiss. The plaintiffs have filed an opposing memorandum and a cross-motion.

The case arises out of the plaintiff's purchase of two parcels of land in Martn County, Florida. Subsequent to their purchase, Executive 100, Inc. ("Executive") and Kings Ridge 239, Inc. ("Kings Ridge") applied to the defendants, members of the County zoning authority, for permission to rezone land to allow for residential development. The defendants refused to redesignate the land and the plaintiffs filed suit here.

The defendants first contend that they should be dismissed in so much as the plaintiffs are suing them in their individual capacities, as opposed to their official status as members of the zoning board. The complaint seeks both compensatory and punitive damages against each defendant. It also alleges that each member of the Board of County Commissioners acted with malice or in reckless disregard of the plaintiffs' rights by voting against the rezoning application.

Although the Supreme Court has not decided the issue, it is *fairly accepted* that legislative immunity extends to local legislators. *See Lake Co. Estates, Inc. v. Tahoe Reg. Plan*, 440 U.S. 391, 403-404 and n.25(1979); *Hernandez v. City of Lafeyette*, 643 F.2d 1188, 1192-93 (5th Cir. Unit A May 1981). For the individual defendants to be immunized, they must demonstrate that their actions were

within "the sphere of legitimate legislative activity." *See Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829(11th Cir. 1982); reh'g denied(11th Cir. 1982).

Here, the only alleged wrongful act committed by the individual defendants was their vote to deny the plaintiffs' application for an amendment to the Comprehensive [Zoning] Plan and their "malice." Certainly there is no queston that the mere act of voting is immunized. In terms of the allegation of malice, this conclusory allegation also does not prevent the application of immunity. The Eleventh Circuit has clearly stated that the complaint must allege sufficient facts to determine whether immunity is applicable. *See Marx v. Gumbinner*, 855 F.2d 783, 788-89 and n.7 (11th Cir. 1988). If a mere allegation of "malice" is deemed sufficient to preclude immunity, the policy underlying its application — to protect officials from frivolous litigation in the sense of a drain on their limited resources — will be undermined. Therefore, each of the defendants must be dismissed from this suit in their individual capacities.

The defendants' second argument why the complaint must be dismissed is that the plaintiffs' case is premature. The defendants contend that the whole complaint is merely an action under 42 U.S.C. § even though it alleges other legal theories for relief. The complaint is structured as follows: (a) Count I-due process, (b) Count II - equal protection, (c) Count III - unreasonable regulation, (d) Count IV - confiscation, and (e) Count V - interference with prospective business advantage. These five counts pertain to the claims of Executive. Counts VI through X are just restated as claims for Kings Ridge.

The basis for the defendants argument is that the complaint involves a "taking," involving one set of common facts — a rezoning and the refusal of the zoning authorities to allow exceptions. The defendants cite the case of *Williamson Co. Regional Planning v. Hamilton Bank*, 473 U.S. 172 (1985), as authority.

The *Williamson* case dealt with a challenge under § 1983 and under Fourteenth Amendment Due Process to a situation where a local zoning body refused to rezone a parcel of land. In declining to reach the merits, the Court found that the case was

premature for two reasons. First, there was no final decision of the local zoning body. *See Williamson,* 473 U.S. at 193-194. In that case, the plaintiff had not applied for variances, as allowed by law. Here, the defendants are incorrect in their contention that such is also true in this case. The complaint clearly states that the plaintiffs applied for and were denied an amendment to the Comprehensive Plan and a rezoning application *See* Complaint, ¶¶18-23. The defendants are correct in asserting that this finality requirement is not an added requirement of exhaustion of administrative remedies. *See Williamson,* 473 U.S. at 192. However, this does not mean that the county commissioners' decision was not final. In *Williamson,* there was no final decision of the local body because there was still an unexplored option that they would change their mind on proper application for a variance, as opposed to any requirement that the plaintiff appeal that decision to another, higher authority. The same is not true here. The Martin County Board refused to rezone and the plaintiffs allege there is no other variance or exception procedure available to urge reconsideration. *See* Complaint, ¶¶19-20, 22-23; Plaintiffs' Response at 5. The defendants urge that "until this Court knows what use Martin County will permit Plaintiffs to make of their property," there is no final decision. This is clearly erroneous as the plaintiffs' only options now are to disobey the zoning law or sit by for some indefinite time until Martin County changes its mind. The law does not force the plaintiffs into this dilemma.

The second basis for the holding in *Williamson* was the fact that the state law in that case provided for an adequate remedy in the form of an inverse condemnation action. Hence, the Court could not determine the extent of the taking, if any, until the plaintiff had exhausted his state procedure for redress. *See Williamson,* 473 U.S. at 1985. The defendants here note that since the Supreme Court's decision of *First English Evangelical Lutheran Church v. Los Angelos County,* 482 U.S. ____ , 107 S.Ct. 2378(1987), there is a *constitutional right* to an inverse condemnation action where there has been a taking. *See Joint Ventures, Inc. v. Department of Transportation,* 319 So.2d 1069, 1071(Fla. 1st DCA 1988) (recognizing the binding nature of *First English*). In *Williamson,* the availability of a state suite was the basis for the Court's dismissal of the plaintiff's Due Process claim. *See* 105 S.Ct. at

199-200. Further, because of the *First English* holding that there is a constitutional right to inverse condemnation action, the Eleventh Circuit's holding in *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1519(11th Cir. 1987) ("we conclude that Florida does not avail a property owner an action to recover just compensation through inverse condemnation for injuries sustained as a result of an unreasonable zoning ordinance"), is not determinative here.

Therefore, Counts I and VI of the complaint must be dismissed as premature.

The other theories in the complaint must also be dismissed. Counts II and VII involve Equal Protection, as applied to these plaintiffs. Because this case does not involve a suspect or near-suspect category such as race, gender, or illegitimacy, or involve a fundamental right, but concerns mere economic regulation, the appropriate standard is "mere rationality." *See Linsey v. National Carbonic Acid*, 220 U.S. 61 (1911). *The fact that the plaintiffs have the right to pursue a state rememdy undermines their claim that the zoning authority has acted irrationally.* Therefore, these counts are also premature under the holding of *Williamson*.

Counts III and VIII deal with claims of "unreasonable regulation." Their constitutional basis lies in the right to Due Process. *See State of Washington ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116(1928); *Williamson*, 473 U.S. at 197-200. Counts IV and IX concern claims of "confiscation." They are also rooted in either Fourteenth Amendment Due Process or Fifth Amendment "taking" jurisprudence. Hence, these four counts must be dismissed.

Lastly, Counts V and X contain a claim of "interference with prospective economic advantage." Of course, there is not Constitutional basis for this claim other than the Fifth or Fourteenth Amendment. Therefore, it also falls within the holding of *Williamson*. On the other hand, if this is just a pendent state claim, it must also be dismissed on the ground that the plaintiffs have not stated a prima facie case. The complaint does not allege that there was a contract between the plaintiffs and their prospective customers, *see eq. Paul's Drugs, Inc. v. Southern Bell Telephone and Telegraph Co.*, 175 So.2d 203(Fla. 3rd DCA 1965), nor is there any

allegation of the existence of a business relationship under which the plaintiffs had legal rights, *see eq. Lake Gateway Motor Inn, Inc. v. Matt's Sunshine Gift Shops, Inc.*, 361 So.2d 769(Fla. 1978).

Having considered the above matters, and the record in this cause, it is hereby

ORDERED AND ADJUDGED that the defendants' motion to dismiss is **GRANTED.** The defendants are **DISMISSED** as parties to this action in their individual capacity. Further, the plaintiffs' complaint is hereby **DISMISSED** as premature.

The defendants' motion for more definite statement as to facts underlying the alleged liability of the defendants in their individual capacity is **DENIED** as moot.

The plaintiffs' motion to abate proceedings is hereby **DENIED** as meritless. Since the plaintiffs must proceed in state court and because the state courts must recognize federal rights, any federal claims must be raised in that proceeding or risk claim preclusion in subsequent suits pursuant to the doctrine of res judicata.

DONE AND ORDERED this 23rd day of May, 1989.

s/JOSE A. GONZALEZ, JR.
JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

The Fourteenth Amendment provides in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const.Amend. XIV, § 1.

42 U.S.C. § 1983 (1981) provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen on the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

CASE NO. 88-14188-CIV-JAG

EXECUTIVE 100, INC., a Florida corporation, and KINGS RIDGE 239 INC., a Florida Corporation,

Plaintiffs,

vs.

MARTIN COUNTY, a political subdivision of the State of Florida; JOHN W. HOLT, JR.; FRANK WACHA; TOM KENNY; TOM HIGGINS; MARGARET HURCHALLA, individually and in their capacity as Members of the Board of County Commissioners,

Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

COMES NOW, the Plaintiff, EXECUTIVE 100, INC., a Florida corporation, and KINGS RIDGE 239, INC., a Florida corporation, by and through undersigned counsel and sues the Defendants, MARTIN COUNTY, a political subdivision of the State of Florida and individuals, alleging as follows:

AS TO ALL COUNTS

1. That this action arises under the United States Constitution, specifically the Fourteenth Amendment and under Title 42 USC 1983, for damages and declaratory and injunctive relief.

2. That the jurisdiction of the Court falls under 28 USC 1331 and 1343(3)(4). The matter in controversy exceeds $10,000, exclusive of interest, court costs and attorneys' fees.

3. That Plaintiff, EXECUTIVE 100, is a corporation organized and operating under the laws of the State of Florida.

4. That Plaintiff, KINGS RIDGE 239, INC., is a corporation

organized and operating under the laws of the State of Florida.

5. That the Defendant, MARTIN COUNTY, is a political subdivision of the State of Florida and has as its local planning agency as defined by Chapter 163, Florida Statutes, the Martin County Planning and Zoning Board and as its governing body, the Martin County Board of County Commissioners.

6. That the Plaintiff, EXECUTIVE 100, is the owner of a parcel of land, approximately 184 acres in size and located at the northwest corner of the intersection of Interstate 95 and County Road 714. Said property is currently zoned Rural Ranchette which is a residential zoning designation permitting one (1) unit per five (5) acres.

7. That the Plaintiff, KINGS RIDGE 239, INC., is the owner of a parcel of land, approximately 30 acres in size and located between The Florida Turnpike and Interstate 95 at the intersection of County Road 708. Said property is currently zoned Agricultural which permits agricultural uses of the property.

8. That the Defendant, JOHN W. HOLT, JR., is a resident of Martin County, Florida and at all times material hereto is a member of the Martin County Board of County Commissioners.

9. That the Defendant, FRANK WACHA, is a resident of Martin County, Florida and at all times material hereto is a member of the Martin County Board of County Commissioners.

10. That the Defendant, TOM KENNY, is a resident of Martin County, Florida and at all times material hereto is a member of the Martin County Board of County Commissioners.

11. That the Defendant, TOM HIGGINS, is a resident of Martin County, Florida and at all times material hereto is a member of the Martin County Board of County Commissioners.

12. That the Defendant, MARGARET HURCHALLA, is a resident of Martin County, Florida and at all times material hereto is a member of the Martin County Board of County Commissioners.

13. That the acts and practices of the Defendants, their agents, employees and representatives have been and are being

performed under color of law, and, therefore, come within the definition of State action contained within the Fourteenth Amendment of the United States Constitution.

14. That the Plaintiff, EXECUTIVE 100, acquired ownership of the subject property on July 17, 1986.

15. That the Plaintiff, KINGS RIDGE, acquired ownership of the subject property on January 23, 1985.

16. That on April 1, 1982, Defendants, MARTIN COUNTY, adopted Ordinance 189, which enacted the Martin County Comprehensive Plan. Said Plan sets forth the land use designations for all property within the County and has been amended repeatedly since its adoption.

17. That said Comprehensive Plan includes an amendment procedure whereby property owners may apply for changes in the land use designation. A concurrent, simultaneous rezoning application is required with said application.

18. That in September, 1987, the Plaintiff, EXECUTIVE 100, applied for an amendment to the existing Martin County Comprehensive Plan to change the land use designation of its property from Rural Ranchette to Light Industrial. Simultaneously a required rezoning application for the property was filed by the Plaintiff.

19. That on December 3, 1987, the Martin County Planning and Zoning Board denied said applications.

20. That on March 29, 1988, the Martin County Commission also denied Plaintiff's applications.

21. That in September, 1987, the Plaintiff, KINGS RIDGE, applied for an amendment to the existing Martin County Comprehensive Plan to change the land use designation of its property from Agricultural to Industrial. Simultaneously, a required rezoning application for the property was filed by the Plaintiff.

22. That the Martin County Planning and Zoning Board denied said applications.

23. That on December 15, 1987, the Martin County

Commission also denied Plaintiff's applications.

24. That Defendants intentionally and with malice and reckless disregard for the rights of the Plaintiffs, voted to deny the Plaintiffs' applications without a reasonable, rational relationship between said denial and the public health, safety and welfare of the residents of Martin County.

25. That the Defendants, individually, violated the constitutional rights of both Plaintiffs by denying the subject applications without indicating substantial reasonable debatable reasons to do so.

26. That the Plaintiffs have been damaged by violation of their civil rights in that, among other things, the value of the subject properties has been significantly diminished, and the County's actions have intimidated potential purchasers from negotiating with the Plaintiffs for the purchase of the subject properties and from purchasing the subject properties. At all times material to this cause, a market has existed for the development and/or sale of the subject properties as industrial properties.

27. That there is a bona fide, actual, justifiable controversy existing between the parties herein. The Plaintiffs have no adequate remedy at law, and there is an actual, practical and present need for declaratory and injunctive relief because, unless enjoined, the County's actions will continue to result in a loss of Plaintiffs' substantial rights to the use and enjoyment of their property. Until the controversy is resolved, Plaintiffs cannot use, develop or sell the subject properties.

28. That all conditions precedent to the relief demanded herein have been performed or have occurred.

29. That the Plaintiffs have employed the undersigned attorney to enforce their rights, agreeing to pay the undersigned attorney a reasonable fee for her services.

COUNT I
EXECUTIVE 100
DUE PROCESS VIOLATION

30. That the Plaintiff, EXECUTIVE 100, realleges Paragraphs

1, 2, 3, 4, 5, 6, 8-20, 24-29.

31. That the subject property is located adjacent to Interstate 95 and just north of County Road 714 in Martin County. Property directly to the south of the subject property has been reclassified to a Planned Unit Development of a commercial nature which will provide for the improvement of said property as an expressway service center. Property directly east of I-95 and at the intersection of County Road 714 has been redesignated as Planned Unit Development of a residential nature but at the same time also includes commercial development adjacent to the residential area. Property located at similar intersections of I-95 and other County Roads, including County Road 76, have been approved for either commercial or industrial development rather than for residential development.

32. That Martin County, upon its own initiative, redesignated similar property located at Interstate 95, the Florida Turnpike and County Road 708 as Industrial on its Comprehensive Land Use Map.

33. That because the subject property is located directly adjacent to Interstate 95 and will be directly north of an expressway service center, and because the subject property is irregularly shaped in a triangle fashion, the subject property is not practical, suitable or realistic for residential purposes.

34. That the Defendants' action in denying Plaintiff's request for land use re-designation, thus preventing the Plaintiff from using said property for industrial purposes, deprives the Plaintiff of property without due process of law in violation of the Fourteenth Amendment and 42 U.S.C. Section 1983 in that those actions bear no relationship to the public health, safety, welfare or morals, or in the alternative, are more severe and strict than necessary to achieve valid police power purposes. There is no substantial relationship between the County's attempt to prohibit the Plaintiff from using the subject properties for light industrial use and the public health, safety and welfare.

35. That the Defendants failed to give any debatable reasons to deny the subject applications at the Martin County Commission Meeting of March 29, 1988. Therefore, said denial was

arbitrary and capricious.

36. That the Defendants' actions also have deprived the Plaintiff of property without due process of law in violation of the Fourteenth Amendment and 42 U.S.C. Section 1983 in that the County's actions have been arbitrarily, and capriciously applied to the Plaintiff.

37. That the Defendants' actions, while depriving Plaintiff of property without due process, have resulted and unless enjoined, will continue to result in substantial and reparable harm to the Plaintiff, including denial to the Plaintiff of the opportunity otherwise available to it to develop and sell its property for industrial use.

38. That the individual Defendants' decisions in reviewing and denying Plaintiffs' requests have been made with malice toward the Plaintiff, have been made with reckless disregard for the rights of the Plaintiff, have been arbitrary, have been capricious, willful and wanton, all of which justify the imposition of punitive damages against each Defendant in the amount of $1,000,000.00.

WHEREFORE, the Plaintiff prays as follows:

A. That the Court enter its Order declaring that prohibiting the Plaintiff from using the subject property for industrial use has deprived Plaintiff of its property without due process of law, and the County's Comprehensive Land Use Plan, zoning codes and any other ordinance which would so prohibit Plaintiff are unconstitutional as applied to the subject property and, therefore, are of no legal force or effect,

B. That the Court enter its Order declaring that Martin County's Comprehensive Land Use Plan, zoning codes and any other ordinance which would prohibit Plaintiff from using the subject property for industrial use are unconstitutional as applied to the subject property,

C. That the Court enter its Order preliminarily and permanently enjoining the County from enforcing the County's Comprehensive Plan, zoning codes or any other ordinance to preclude Plaintiff from using the subject property for industrial purposes,

D. For compensatory damages against Martin County and the individual Defendants in excess of $18,400,000.00, exclusive of interest in costs,

E. For punitive damages in the amount of $1,000,000.00 against each individual Defendant,

F. For reasonable attorney's fees and costs of this action, and

G. For such other and further relief as the Court deems proper.

COUNT II
EXECUTIVE 100
EQUAL PROTECTION

39. That the Plaintiff, EXECUTIVE 100, realleges and incorporates herein Paragraphs 1, 2, 3, 5, 6, 8-20, and 24-29.

40. That the subject property is virtually the only property adjacent to Interstate 95 which is zoned for residential purposes at a density of one (1) unit per five (5) acres.

41. That the Plaintiff's property, despite its residential zoning classification, is similarly situated to other properties in the County that have been, or are being or will be used for industrial or commercial purposes.

42. That in further denial of Plaintiff's constitutionally guaranteed right to equal protection of the laws, the Defendants have permitted the owners of other properties, similarly situated in all material respects to the subject property, to develop their properties for non-residential purposes.

43. That Martin County, upon its own initiative, redesignated similar property located at Interstate 95, the Florida Turnpike and County Road 708 as Industrial on its Comprehensive Land Use Map.

44. That the individual Defendants' decisions in reviewing and denying Plaintiffs' requests have been made with malice toward the Plaintiff, have been made with reckless disregard for the rights of the Plaintiff, have been arbitrary, have been capricious, willful

and wanton, all of which justify the imposition of punitive damages against each Defendant in the amount of $1,000,000.00.

WHEREFORE, the Plaintiff prays as follows:

A. That the Court enter its Order declaring that prohibiting industrial or non-residential use of the subject property has deprived the Plaintiff of the equal protection of the law and is, therefore, of no legal force or effect,

B. That the Court enter its Order preliminarily and permanently enjoining the County from enforcing the County's Comprehensive Plan, zoning code, or any other ordinance to preclude Plaintiff from using the subject properties for industrial or non-residential purposes,

C. For compensatory damages in excess of $18,400,000.00, exclusive of interest in costs,

D. For punitive damages in the amount of $1,000,000.00 against each individual Defendant,

E. For reasonable attorney's fees and costs of this action, and

F. For such other and further relief as the Court deems proper.

COUNT III
EXECUTIVE 100
UNREASONABLE REGULATION

45. That the Plaintiff, EXECUTIVE 100, realleges and incorporates herein Paragraphs 1, 2, 3, 5, 6, 8-20, and 24-29.

46. That precluding industrial use of the subject property is arbitrary and unreasonable, has no reasonably debatable relationship to the public health, welfare, safety or morals, is inconsistent with surrounding areas and uses and is more strict or severe than necessary.

47. That because of its location, size and shape, the subject property is unsuitable for use for residential purposes.

48. That Martin County, upon its own initiative, redesignated

similar property located at Interstate 95, the Florida Turnpike and County Road 708 as Industrial on its Comprehensive Land Use Map.

49. That the individual Defendants' decisions in reviewing and denying Plaintiffs' requests have been made with malice toward the Plaintiff, have been made with reckless disregard for the rights of the Plaintiff, have been arbitrary, have been capricious, willful and wanton, all of which justify the imposition of punitive damages against each Defendant in the amount of $1,000,000.00.

WHEREFORE, the Plaintiff prays as follows:

A. That the Court enter its Order declaring that prohibiting commercial, industrial or non-residential use of the subject property is unreasonable, arbitrary and capricious and, therefore, of no legal force or effect.

B. That the Court enter its Order preliminarily and permanently enjoining "the County" from enforcing the County's Comprehensive Land Use Plan, zoning code, or any other ordinance to preclude Plaintiff from using the subject property for commercial purposes,

C. For reasonable attorney's fees and costs of this action, and

D. For such other and further relief as the Court deems proper.

COUNT IV
EXECUTIVE 100
CONFISCATORY

50. That the Plaintiff, EXECUTIVE 100, realleges and incorporates herein Paragraphs 1, 2, 3, 5, 6, 8-20, and 24-29.

51. That the Defendants' preclusion of industrial or non-residential use of the subject property is so harsh and substantial in comparison with the trivial public benefit, if any, so as to make such prohibition confiscatory.

WHEREFORE, the Plaintiff prays as follows:

A. That the Court enter its Order declaring that

prohibiting industrial or non-residential use of the subject property is unreasonable, arbitrary, capricious and confiscatory,

B. That the Court enter its Order preliminarily and permanently enjoining the County from enforcing the County's Comprehensive Land Use Plan, zoning code, or any other ordinance to preclude Plaintiff from using the subject property for industrial or non-residential purposes,

C. For reasonable attorney's fees and costs of this action, and

D. For such other and further relief as the Court deems proper.

COUNT V
EXECUTIVE 100
INTERFERENCE WITH PROSPECTIVE
ECONOMIC ADVANTAGE

52. That the Plaintiff, EXECUTIVE 100, realleges and incorporates herein Paragraphs 1, 2, 3, 5, 6, 8-20, and 24-29.

53. That Martin County, upon its own initiative, redesignated similar property located at Interstate 95, the Florida Turnpike and County Road 708 as Industrial on its Comprehensive Land Use Map.

54. That the Defendants were aware that the Plaintiff had prospective beneficial economic relationships with certain potential purchasers of the subject property.

55. That notwithstanding their knowledge that the subject property was not suited for residential use, the Defendants told potential purchasers of the subject property that the subject property could be used, now and in the future only for residential purposes.

56. That the Defendants' actions have intentionally interfered with Plaintiff's perspective beneficial economic relationships.

57. That the Defendants' actions have been reckless or with callous disregard of the rights of the Plaintiff.

58. That the individual Defendants' decisions in reviewing and

denying Plaintiffs' requests have been made with malice toward the Plaintiff, have been made with reckless disregard for the rights of the Plaintiff, have been arbitrary, have been capricious, willful and wanton, all of which justify the imposition of punitive damages against each Defendant in the amount of $1,000,000.00.

WHEREFORE, the Plaintiff prays as follows:

A. That the Court enter its Order preliminarily and permanently enjoining the County from interfering with Plaintiff's prospective economic advantage,

B. For compensatory damages in excess of $18,400,000.00 exclusive of interest and costs,

C. For punitive damages in the amount of $1,000,000.00 against each individual Defendant,

D. For reasonable attorney's fees and costs of this action, and

E. For such other and further relief as the Court deems proper.

COUNT VI
KINGS RIDGE
DUE PROCESS VIOLATION

59. That the Plaintiff, KINGS RIDGE, realleges Paragraphs 1, 2, 3, 4, 5, 7, 8-17, and 21-29.

60. That the subject property is located adjacent to Interstate 95 and just south of County Road 708 in Martin County.

61. Property to the north of the subject property has been redesignated by action of Martin County itself for industrial purposes. Property located at similar intersections of I-95 and County Roads, including County Road 76, have been approved for either commercial or industrial development rather than for residential development.

62. That because the subject property is located directly between the Florida Turnpike and Interstate 95 and will be directly south of industrial property, and because the subject property is irregularly shaped in a long narrow fashion, the subject property

is not practical, suitable or realistic for agricultural purposes.

63. That the Defendants' action in denying Plaintiff's request for land use designation thus preventing the Plaintiff from using said property for industrial purposes, deprives the Plaintiff of property without due process of law in violation of the Fourteenth Amendment and 42 U.S.C. Section 1983 in that those actions bear no relationship to the public health, safety, welfare or morals, or in the alternative, are more severe and strict than necessary to achieve valid police power purposes. There is no substantial relationship between the County's attempt to prohibit the Plaintiff from using the subject properties for light industrial use and the public health, safety and welfare.

64. That the Defendants failed to give any debatable reasons to deny the subject applications at the Martin County Commission Meeting of December 15, 1988. Therefore, said denial was arbitrary and capricious.

65. That the Defendants' actions also have deprived the Plaintiff of property without due process of law in violation of the Fourteenth Amendment and 42 U.S.C. Section 1983 in the the County's actions have been arbitrarily, and capriciously applied to the Plaintiff.

66. That the Defendants' actions, while depriving Plaintiff of property without due process, have resulted and unless enjoined, will continue to result in substantial and reparable harm to the Plaintiff, including denial to the Plaintiff of the opportunity otherwise available to it to develop and sell its property for industrial use.

67. That the individual Defendants' decisions in reviewing and denying Plaintiffs' requests have been made with malice toward the Plaintiff, have been made with reckless disregard for the rights of the Plaintiff, have been arbitrary, have been capricious, willful and wanton, all of which justify the imposition of punitive damages against each Defendant in the amount of $1,000,000.00.

WHEREFORE, the Plaintiff prays as follows:

A. That the Court enter its Order declaring that prohibiting the Plaintiff from using the subject property for industrial

use has deprived Plaintiff of its property without due process of law, and the County's Comprehensive Land Use Plan, zoning codes and any other ordinance which would so prohibit Plaintiff are unconstitutional as applied to the subject property and, therefore, are of no legal force or effect,

B. That the Court enter its Order declaring that Martin County's Comprehensive Land Use Plan, zoning codes and any other ordinance which would prohibit Plaintiff from using the subject property for industrial use are unconstitutional as applied to the subject property,

C. That the Court enter its Order preliminarily and permanently enjoining the County from enforcing the County's Comprehensive Plan, zoning codes or any other ordinance to preclude Plaintiff from using the subject property for industrial purposes,

D. For compensatory damages against Martin County and the individual Defendants in excess of $3,000,000.00, exclusive of interest in costs,

E. For punitive damages in the amount of $1,000,000.00 against each individual Defendant,

F. For reasonable attorney's fees and costs of this action, and

G. For such other and further relief as the Court deems proper.

COUNT VII
KINGS RIDGE
EQUAL PROTECTION

68. That the Plaintiff, KINGS RIDGE, realleges and incorporates herein Paragraphs 1, 2, 4, 5, 7, 8-17, and 21-29.

69. That Martin County, upon its own initiative, redesignated similar property located at Interstate 95, the Florida Turnpike and County Road 708 as Industrial on its Comprehensive Land Use Map.

70. That the Plaintiff's property, despite its agricultural zoning

classification, is similarly situated to other properties in the County that have been, or being or will be used for industrial or commercial purposes.

71. That in further denial of Plaintiff's constitutionally guaranteed right to equal protection of the laws, the Defendants have permitted the owners of other properties, similarly situated in all material respects to the subject property, to develop their properties for non-residential purposes.

72. That the individual Defendants' decisions in reviewing and denying Plaintiffs' requests have been made with malice toward the Plaintiff, have been made with reckless disregard for the rights of the Plaintiff, have been arbitrary, have been capricious, willful and wanton, all of which justify the imposition of punitive damages against each Defendant in the amount of $1,000,000.00.

WHEREFORE, the Plaintiff prays as follows:

A. That the Court enter its Order declaring that prohibiting industrial or non-residential use of the subject property has deprived the Plaintiff of the equal protection of the law and is, therefore, of no legal force or effect,

B. That the Court enter its Order preliminarily and permanently enjoining the County from enforcing the County's Comprehensive Plan, zoning code, or any other ordinance to preclude Plaintiff from using the subject properties for industrial or non-residential purposes,

C. For compensatory damages in excess of $3,000,000.00, exclusive of interest in costs,

D. For punitive damages in the amount of $1,000,000.00 against each individual Defendant,

E. For reasonable attorney's fees and costs of this action, and

F. For such other and further relief as the Court deems proper.

COUNT VIII
KINGS RIDGE
UNREASONABLE REGULATION

73. That the Plaintiff, KINGS RIDGE, realleges and incorporates herein Paragraphs 1, 2, 4, 5, 7, 8-17, and 21-29.

74. That precluding industrial use of the subject property is arbitrary and unreasonable, has no reasonable debatable relationship to the public health, welfare, safety or morals, is inconsistent with surrounding areas and uses and is more strict or severe than necessary.

75. That because of its location, size and shape, the subject property is unsuitable for use for agricultural purposes.

76. That Martin County, upon its own initiative, redesignated similar property located at Interstate 95, the Florida Turnpike and County Road 708 as Industrial on its Comprehensive Land Use Map.

77. That the individual Defendants' decisions in reviewing and denying Plaintiffs' requests have been made with malice toward the Plaintiff, have been made with reckless disregard for the rights of the Plaintiff, have been arbitrary, have been capricious, willful and wanton, all of which justify the imposition of punitive damages against each Defendant in the amount of $1,000,000.00.

WHEREFORE, the Plaintiff prays as follows:

A. That the Court enter its Order declaring that prohibiting commercial, industrial or non-residential use of the subject property is unreasonable, arbitrary and capricious and, therefore, of no legal force or effect,

B. That the Court enter its Order preliminarily and permanently enjoining the County from enforcing the County's Comprehensive Land Use Plan, zoning code, or any other ordinance to preclude Plaintiff from using the subject property for commercial purposes,

C. For reasonable attorney's fees and costs of this action, and

D. For such other and further relief as the Court deems proper.

COUNT IX
KINGS RIDGE
CONFISCATORY

78. That the Plaintiff, KINGS RIDGE, realleges and incorporates herein Paragraphs 1, 2, 4, 5, 7, 8-17, and 21-29.

79. That the Defendants' preclusion of industrial or non-residential use of the subject property is so harsh and substantial in comparison with the trivial public benefit, if any, so as to make such prohibition confiscatory.

WHEREFORE, the Plaintiff prays as follows:

A. That the Court enter its Order declaring that prohibiting industrial or non-residential use of the subject property is unreasonable, arbitrary, capricious and confiscatory,

B. That the Court enter its Order preliminarily and permanently enjoining the County from enforcing the County's Comprehensive Land Use Plan, zoning code, or any other ordinance to preclude Plaintiff from using the subject property for industrial or non-residential purposes,

C. For reasonable attorney's fees and costs of this action, and

D. For such other and further relief as the Court deems proper.

COUNT X
KINGS RIDGE
INTERFERENCE WITH PROSPECTIVE
ECONOMIC ADVANTAGE

80. That the Plaintiff, KINGS RIDGE, realleges and incorporates herein Paragraphs 1, 2, 4, 5, 7, 8-17, and 21-29.

81. That Martin County, upon its own initiative, redesignated similar property located at Interstate 95, the Florida Turnpike and County Road 708 as Industrial on its Comprehensive Land Use Map.

82. That the Defendants were aware that the Plaintiff had prospective beneficial economic relationships with certain potential

purchasers of the subject property.

83. That notwithstanding their knowledge that the subject property was not suited for agricultural use, the Defendants told potential purchasers of the subject property that the subject property could be used, now and in the future only for agricultural purposes.

84. That the Defendants' actions have intentionally interfered with Plaintiff's perspective beneficial economic relationships.

85. That the Defendants' actions have been reckless or with callous disregard of the rights of the Plaintiff.

86. That the individual Defendants' decisions in reviewing and denying Plaintiffs' requests have been made with malice toward the Plaintiff, have been made with reckless disregard for the rights of the Plaintiff, have been arbitrary, have been capricious, willful and wanton, all of which justify the imposition of punitive damages against each Defendant in the amount of $1,000,000.00.

WHEREFORE, the Plaintiff prays as follows:

A. That the Court enter its Order preliminarily and permanently enjoining the County from interfering with Plaintiff's prospective economic advantage,

B. For compensatory damages in excess of $3,000,000.00 exclusive of interest and costs,

C. For punitive damages in the amount of $1,000,000.00 against each individual Defendant,

D. For reasonable attorney's fees and costs of this action, and

E. For such other and further relief as the Court deems proper.

DEMAND FOR JURY TRIAL

The Plaintiff demands, pursuant to Federal Rule of Civil Procedure 38 (b), trial by jury of any issue so triable of right.

Respectfully Submitted,

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